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Wes Daniels  
*University of Miami School of Law*

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# **"Derelicts," Recurring Misfortune, Economic Hard Times and Lifestyle Choices: Judicial Images of Homeless Litigants and Implications for Legal Advocates**

WES DANIELS†

I was strong, that's all I had.<sup>1</sup>

## **INTRODUCTION**

Whether portrayed as derelicts,<sup>2</sup> as victims of misfortune,<sup>3</sup> or as people burdened by structural forces beyond their control,<sup>4</sup> the image of homeless people as reflected in most court opinions

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Lucie White's work, always incisive and thought-provoking, continued to be a major source of inspiration. For their advocacy on homelessness legal issues, my appreciation goes to Steven Banks, Gary Blasi, Maria Foscarinis, Robert Hayes, Stanley Herr, Mary Ellen Hombs, Valerie Jonas, Gale Lucy, Arthur Rosenberg, Barbara Sard, Virginia Shubert, Rodney Thaxton (in memoriam), Solangel Verde, Benjamin Waxman and Stephen Wizner.

This is dedicated to Susan, because you relieve suffering; and to Katie and Lisa: wherever you are, I'll always be home.

1. Hell ("[T]hat's my name. My mother called me that"), a 28-year-old Puerto Rican homeless woman living in Philadelphia, *quoted in* STEVEN VANDERSTAAY, *STREET LIVES: AN ORAL HISTORY OF HOMELESS AMERICANS* 72-73 (1992).

2. See *Callahan v. Carey*, No. 79-42582 (N.Y. Sup. Ct. Dec. 5, 1979), *reprinted in* N.Y. L.J., Dec. 11, 1979, at 10 [hereinafter *Callahan*].

3. See *Hodge v. Ginsberg*, 303 S.E.2d 245, 250 (W. Va. 1983) and text, *infra* pp. 15-16.

4. See *Pottinger v. City of Miami*, 810 F. Supp. 1551, 1563 (S.D. Fla. 1992), *appeal pending*, 76 F.3d 1154 (Fla. 1996) (ordering parties to discuss settlement). See also *infra* pp. 16-22.

is one of weakness, helplessness and despair. Such portrayals may seem necessary to legal advocates and decision-makers who want to find a way to provide relief to suffering people within the narrow confines of legal doctrine.<sup>5</sup> But these images are hardly complete or even accurate, and their use in litigation risks perpetuating socially harmful stereotypes and stigma. In addition, projecting the image is becoming less successful in convincing courts to rule in favor of homeless litigants. This approach, therefore, may be detrimental to those it is intended to benefit, in both the long and the short term.

Many homeless people display great strength in the struggle to survive under extraordinarily adverse conditions, in a context of very limited realistic choices.<sup>6</sup> But the law does not generally value the strength and struggle of the poor and victimized. In fact, as scholars have noted in a variety of areas, legal doctrine is structured in such a way as to effectively erase struggle.<sup>7</sup> With no change in sight, those who want to work ef-

5. See Martha Minow, *Breaking the Law: Lawyers and Clients in Struggles for Social Change*, 52 U. PITT. L. REV. 723, 730 (1991) (noting that "the very effort to make legal arguments may require accepting assumptions and terms of debate that advocates most deeply wish to challenge . . . particularly in arguments . . . on behalf of groups that have been excluded or degraded historically").

6. "[H]omelessness . . . points up the great resilience of people and their ability to create networks of support and connection under the most harrowing of circumstances." VANDERSTAAY, *supra* note 1, at 187. For works that describe the strength and resourcefulness homeless people display in order to survive, see, e.g., David A. Snow, et al., *Material Survival Strategies on the Street: Homeless People as Bricoleurs*, in HOMELESSNESS IN AMERICA 86-96 (Jim Baumohl ed., 1996); DAVID A. SNOW & LEON ANDERSON, DOWN ON THEIR LUCK: A STUDY OF HOMELESS STREET PEOPLE (1993); Kim Hopper et al., *Economics of Makeshift: Deindustrialization and Homelessness in New York City*, 14 URB. ANTHROPOLOGY 183 (1985); ELLIOT LIEBOW, TELL THEM WHO I AM: THE LIVES OF HOMELESS WOMEN (1993); KATHLEEN HIRSCH, SONGS FROM THE ALLEY (1989); JONATHAN KOZOL, RACHEL AND HER CHILDREN: HOMELESS FAMILIES IN AMERICA (1988); Ralph Hernandez et al., *AIDS and Homelessness: Personal Accounts*, 2 YALE J.L. & LIB. 85 (1991).

7. See generally Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1 (1991), and *Exit: Power and the Idea of Leaving in Love, Work, and the Confirmation Hearings*, 65 S. CAL. L. REV. 1283 (1992) (battered women); Susan Stefan, *Silencing the Different Voice: Competence, Feminist Theory and Law*, 47 U. MIAMI L. REV. 763 (1993) (women labeled mentally ill), and *The Protection Racket: Rape Trauma Syndrome, Psychiatric Labeling, and Law*, 88 NW. U. L. REV. 1271 (1994) (rape victims); Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G*, 38 BUFF. L. REV. 1 (1990) [hereinafter White, *Subordination*] (welfare recipients). Anthony Alfieri urges poverty lawyers to "discredit[ ] traditional images of client dependency by crediting client narratives of daily struggle." Anthony Alfieri, *Reconstructive Poverty Law Practice: Learning the Lessons of Client Narrative*, 100 YALE L.J. 2107, 2141 (1991). He believes that the "image of client dependency," which he considers "the primary contradiction of the poverty lawyer's interpretive tradition," is "contradicted by the client's public and private assertions of

fectively with homeless people to improve their life conditions may have to look beyond traditional lawyers' work.

The purpose of this Article is to identify the images of homeless people and the assumptions about the causes of their homelessness that are reflected by judges in ruling on their legal claims, and to suggest implications for those who wish to work with homeless individuals struggling to relieve their suffering.<sup>8</sup>

The Article begins with a brief survey of the litigation undertaken in the past two decades by lawyers and other advocates for homeless people, in which the focus has moved from attempting to gain public benefits to resisting the increasing use of law enforcement to deal with widespread visible homelessness.

The language of the cases is then analyzed. Court opinions reflect shifts, over time, in assumptions about the cause of homelessness: from personal dereliction, to bad luck, to structural economic forces, to lifestyle choices.

Since a central question for the courts often seems to be whether and to what extent homelessness is "voluntary," the Article reviews the application of that concept to the legal claims of homeless litigants, particularly with respect to recent Eighth Amendment status-crime challenges. The argument that homeless people are protected by the Constitutional ban on cruel and unusual punishment for engaging in life-sustaining activities they have no choice but to perform in public was initially somewhat successful. This reasoning, however, is increasingly being rejected.

This Article notes what social scientists, the public at large, and homeless individuals themselves believe about the causes of, and the solutions to, homelessness. A more informed view of

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power." *Id.* at 2134.

8. Others have examined the ways in which stereotypical assumptions about oppressed people affect the outcomes they can achieve through the legal process. For a path-breaking, comprehensive, and compelling analysis in one such context, see Marc A. Fajer, *Can Two Real Men Eat Quiche Together?: Storytelling, Gender Role Stereotypes, and Legal Protections for Lesbians and Gay Men*, 46 U. MIAMI L. REV. 511 (1992) (arguing, generally, that consciousness of common judicial stereotypes allows advocates to devise more effective methods of winning cases without reinforcing assumptions that cause their clients harm). For other examples, see also Elizabeth M. Iglesias, *Structures of Subordination: Women of Color at the Intersection of Title VII and the NLRA. Not!*, 28 HARV. C.R.-C.L. L. REV. 395 (1993); Kevin R. Johnson, *Los Olvidados: Images of the Immigrant, Political Power of Noncitizens, and Immigration Law and Enforcement*, 1993 B.Y.U. L. REV. 1139; Peter Margulies, *Difference and Distrust in Asylum Law: Haitian and Holocaust Refugee Narratives*, 6 ST. THOMAS L. REV. 135 (1993).

the nature of homelessness is essential for lawyers to battle effectively for its elimination.

The conclusion critiques the "involuntariness" litigation strategy, arguing that it is ultimately ineffective in achieving meaningful solutions to the problems of homeless individuals, whether or not it wins lawsuits. In any event, homelessness for many may in fact be a "voluntary" choice made from a range of unacceptable options. Lawyers, then, should consider alternative approaches: reconceptualizing legal arguments that acknowledge the agency that homeless people exercise, and participating in political work to expand and improve the limited options that constrain the exercise of that agency.

As Lucie White and others have warned, there are serious dangers in constructing and advocating for a category of people called the "homeless," since to do so risks diverting attention away from individuals not literally homeless but whose shelter problems may be equally severe.<sup>9</sup> People officially defined as "homeless" may even reject the label.<sup>10</sup> The focus here is on litigation in which plaintiffs identify themselves (or their lawyers identify them) as homeless, or respond to official categorizations of them as homeless. The questions at issue in these lawsuits involve applicability of legal doctrines to people who are seen to differ from others in that they lack access to permanent housing.<sup>11</sup>

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9. Lucie White, *Representing "The Real Deal"*, 45 U. MIAMI L. REV. 271, 300 (1990) [hereinafter White, *The Real Deal*]. See also Gary Blasi, *And We Are Not Seen: Ideological and Political Barriers to Understanding Homelessness*, 37 AM. BEHAV. SCIENTIST 563, 564 (1994) [hereinafter Blasi, *And We Are Not Seen*] (arguing that "by redefining extreme poverty in terms of homelessness, by advocating for 'the homeless' rather than for the extremely poor . . . and by paying inadequate attention to questions of race, advocates unwittingly harmed the ultimate cause they believed they were serving: alleviating the human suffering that attends extreme deprivation.").

10. See April R. Veness, *Neither Homed Nor Homeless: Contested Definitions and the Personal Worlds of the Poor*, 12 POL. GEOGRAPHY 319, 321 (1993) (finding that "externally-decided" definitions of "home" and "homelessness" often do not correspond to the sense that those targeted with the "homeless" label have of those terms).

11. In addition, "[a]s important as it is not to lose sight of the larger issues of poverty, the particular qualities of deprivation characterizing the state of literal homelessness are striking." Wes Daniels, *Symposium on Law and the Homeless: An Introduction*, 45 U. MIAMI L. REV. 261, 264 (1990-1991) (noting greater problems with health, nutrition, violence and death; discrimination and harassment based on living in public; school problems of homeless children; homeless parents' fear of losing children to child welfare authorities; and the psychologically devastating effect of life on the streets). For just a few recent examples of violence committed against homeless people, see, for example, *Reina v. Texas*, 940 S.W.2d 770, 771 (Tex. App. 1997) (homeless person severely beaten and set on fire in alley behind convenience store); *Franklin v. Mississippi*, 676 So. 2d 287, 288-89 (Miss. 1996) (sixty-one-year-old homeless man living in a field behind a res-

## I. THE AGE(S) OF HOMELESS LITIGATION: A VERY BRIEF SURVEY

Litigation concerning rights of individuals we might call homeless certainly predates 1979.<sup>12</sup> But an opinion issued that year by a New York trial court, *Callahan v. Carey*,<sup>13</sup> is often said to mark the beginning of an era in which lawyers consciously set out to use lawsuits to improve living conditions for homeless individuals.<sup>14</sup>

The earliest cases focused on attempts to establish a right

restaurant attacked by five teenagers, who threw rocks and bricks at him and kicked him for five to seven minutes; he was then fatally shot in the back of the head by one of the youths); Gail Epstein, *A Mismatch on Wheels Turns Fatal*, MIAMI HERALD, Oct. 12, 1996, at B1 (truck driver intentionally drives 18-wheeler into homeless man in wheelchair, knocking him off his wheelchair and crushing his head with the front tire, killing him instantly).

Another potential danger of identifying a category called "homeless" is that it unrealistically homogenizes a group of individuals whose characteristics, circumstances and stories may be very different. See, e.g., Susan Gonzalez Baker, *Gender, Ethnicity, and Homelessness: Accounting for Demographic Diversity on the Streets*, 37 AM. BEHAV. SCIENTIST 476 (1994) (examining diversity among the homeless along the dimensions of gender and ethnicity and noting a heterogeneity among the homeless population unprecedented in U.S. history). However, attempts to portray the homeless as "just like you or me" in order to garner sympathy for their "plight" have been criticized as ignoring the reality that what the homeless have in common is extreme poverty. In addition, for many of "us" who may be "one paycheck away" from becoming homeless, our life histories, conditions, and access to sources of support in times of difficulty make it unlikely that "we" will ever really consider ourselves as just like "them."

There also are important race, ethnicity and gender dimensions to the homelessness issue that are beyond the scope of this Article to address fully. For a call for increased focus on the race dimension, see Kim Hopper, *Taking the Measure of Homelessness: Recent Research on Scale and Race*, 29 CLEARINGHOUSE REV. 730 (1995). For an analysis of one aspect of the gender dimension, see Gretchen P. Mullins, *The Battered Woman and Homelessness*, 3 J.L. & POL'Y 237 (1994).

12. See, e.g., *Edwards v. California*, 314 U.S. 160, 177 (1941) (California statute criminalizing the importation of indigent people into the state is an invalid exercise of police power which imposes an unconstitutional burden on interstate commerce); *Headley v. Selkowitz*, 171 So. 2d 368, 370 (Fla. 1965) (vagrancy statute, even if facially valid, should not be applied to "innocent victims of misfortune . . . who are not [vagrants] either by choice or intentional conduct.").

13. *Callahan*, *supra* note 2.

14. See *Mixon v. Grinker*, 595 N.Y.S.2d 876, 879-80 (N.Y. Sup. Ct. 1993) (reflecting on earlier cases and finding, "the current provisions for housing the homeless resulted not from initiatives of the Executive or Legislature, but rather are the results of litigation."); see also MARY ELLEN HOMBS, *AMERICAN HOMELESSNESS: A REFERENCE HANDBOOK* (2d ed. 1994); Gary Blasi & James Preis, *Litigation on Behalf of the Homeless*, in HOMELESSNESS A NATIONAL PERSPECTIVE 309, 310, 318 & 320 n.7 (Marjorie J. Robertson & Milton Greenblat eds. 1992); Rene I. Jahiel, M.D., Ph.D., *Preventive Approaches to Homelessness*, in HOMELESSNESS A PREVENTION-ORIENTED APPROACH 11, 18-19 (Rene I. Jahiel ed. 1992).

to emergency shelter.<sup>15</sup> *Callahan* opened a wedge to expand emergency shelter opportunities for homeless men in New York.<sup>16</sup> Lawyers then convinced courts to rule that if the City was providing emergency shelter to homeless men, whether or not constitutionally or statutorily mandated, it could not deny similar shelter to homeless women<sup>17</sup> or families.<sup>18</sup> Further, if shelter were offered, it would have to meet minimal habitability standards, including freedom from significant health threats.<sup>19</sup> For example, the placement in mass shelters of particularly vulnerable individuals, such as "tiny babies and pregnant mothers"<sup>20</sup> was held to cause irreparable harm sufficient to enjoin such placements, and to entitle those individuals to a different type of emergency shelter.

Shelter rights were established in places other than New York on the basis of various state and local statutory provisions. In St. Louis, for example, attorneys representing homeless clients used a broadly-worded state statute mandating assistance to the poor<sup>21</sup> to induce the City to agree to a consent judgment<sup>22</sup> requiring the City to create new emergency shelter space, to provide additional permanent housing units, and to operate a reception center and a day center for homeless women, children and families.<sup>23</sup> Litigants in Philadelphia achieved a settlement establishing a right to shelter under local law.<sup>24</sup>

In West Virginia, homeless advocates convinced the state Supreme Court that their clients were among the intended beneficiaries of an adult protective services statute, requiring the

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15. See, e.g., *McCain v. Koch*, 484 N.Y.S.2d 985, 986-87 (N.Y. Sup. Ct. 1984); *Eldredge v. Koch*, 459 N.Y.S.2d 960, 961 (N.Y. Sup. Ct. 1983); *Hodge v. Ginsberg*, 303 S.E.2d 245 (W. Va. 1983); *Callahan*, *supra* note 2.

16. See *Callahan*, *supra* note 2.

17. *Eldredge*, 459 N.Y.S.2d at 961.

18. *McCain*, 484 N.Y.S.2d at 987-88.

19. See, e.g., *Barnes v. Koch*, 518 N.Y.S.2d 539, 542-43 (N.Y. Sup. Ct. 1987); *McCain*, 484 N.Y.S.2d at 987 (a court has the power to issue a preliminary injunction requiring city agencies to provide emergency housing for homeless families that meets the minimum standards of sanitation, safety and decency); *but see* *Mixon v. Grinker*, 627 N.Y.S.2d 668, 674-75 (N.Y. App. Div. 1995) (*per curiam*), *rev'd*, 646 N.Y.S.2d 661, 662-63 (N.Y. 1996).

20. *Slade v. Koch*, 514 N.Y.S.2d 847, 852 (N.Y. Sup. Ct. 1987).

21. MO. REV. STAT. § 205.580 (1949) ("Poor persons shall be relieved, maintained and supported by the county of which they are inhabitants.").

22. *Graham v. Schoemehl*, No. 854-00035 (Mo. Cir. Ct. Nov. 15, 1985).

23. Kenneth M. Chackes, *Sheltering the Homeless: Judicial Enforcement of Governmental Duties to the Poor*, 31 WASH. U. J. URB. & CONTEMP. L. 155, 185-86 (1987).

24. *HOMBS*, *supra* note 14, at 129 (citing Committee for Dignity and Fairness for the Homeless v. Pernesley, No. 886 (Pa. Ct. of Common Pleas, 1985)).

state to provide them emergency shelter, food and medical care.<sup>25</sup>

A series of California cases successfully challenged bureaucratic obstacles that impeded homeless individuals' access to public emergency shelter.<sup>26</sup> Through consent judgments or court orders, counties were prevented from requiring documentation of identity<sup>27</sup> or an address,<sup>28</sup> and were required to provide special assistance to mentally or developmentally disabled applicants in completing a complex and confusing application and intake process.<sup>29</sup>

Other cases established rights to housing-related government assistance. Some state courts held that public benefit programs, such as Aid to Families with Dependent Children, entitled qualified recipients to payment levels high enough to allow them to afford adequate shelter,<sup>30</sup> or at least to computations of standards of need that accurately reflected the true cost of housing.<sup>31</sup>

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25. *Hodge*, 303 S.E.2d 245. Washington, D.C. voters, through a 1984 ballot initiative called the District of Columbia Right to Overnight Shelter Act, created for "[a]ll persons . . . the right to adequate overnight shelter." D.C. CODE ANN. § 3-601 (1988). In 1990, however, the City Council removed by amendment any entitlement to overnight shelter. D.C. Emergency Overnight Shelter Amend. Act of 1990, D.C. Law 8-197, 37 D.C. Regs. 4815 (1990) (codified as D.C. CODE ANN. § 3-206.9(a) (repealed 1994) and §3-609 (repealed 1994). A referendum then narrowly ratified the Council's action. Linda Wheeler, *Homeless Referendum; Shelter Referendum Loses by a Slim Margin*, WASH. POST, Nov. 7, 1990, at A33. See *Washington Legal Clinic for the Homeless v. Barry*, 107 F.3d 32, 33 (D.C. Cir. 1997) (reviewing the history of the legislation, and holding that current law did not create a constitutionally protected entitlement to emergency family shelter).

26. See generally Gary L. Blasi, *Litigation Strategies for Addressing Bureaucratic Disentitlement*, 16 N.Y.U. REV. L. SOC. CHANGE 591 (1987-88); and Blasi & Preis, *supra* note 14, at 313-15.

27. *Eisenheim v. Board of Supervisors*, No. C47953 (L.A. Co. Super. Ct., Dec. 20, 1983) (invalidating a requirement that applicants provide a certified birth certificate or driver's license, as well as a General Relief quota system which controlled the number of persons receiving emergency shelter vouchers).

28. *Nelson v. Board of Supervisors of San Diego County*, 190 Cal. App. 3d 25 (1987) (striking address requirement).

29. *Rensch v. Board of Supervisors*, No. C595155 (L.A. Co. Super. Ct. 1985).

30. See *Massachusetts Coalition for the Homeless v. Secretary of Human Servs.*, 511 N.E.2d 603, 607 (Mass. 1987) (state statute interpreted as directing Dept. of Public Welfare "to provide aid sufficient to permit AFDC recipients to live in homes of their own"). For subsequent developments in this litigation, see *Massachusetts Coalition for the Homeless v. Secretary of Health & Hum. Servs.*, 661 N.E.2d 1276, 1284 (Mass. 1996).

31. See *Jiggetts v. Grinker*, 553 N.E.2d 570, 571 (N.Y. 1990), *rev'g* 543 N.Y.S.2d 414 (N.Y. App. Div. 1989) (state AFDC statute "imposes a statutory duty on the State Commissioner of Social Services to establish [housing] allowances that bear a reasonable relation to the cost of housing."). See also *Boehm v. Superior Court*, 223 Cal. Rptr. 716, 721 (Cal. Ct. App. 1986) (holding that state general assistance statutes require objective de-



In the child welfare context, some courts ordered foster care agencies to assist families in obtaining housing when the lack of adequate shelter was a primary factor preventing a family from staying together or being reunited.<sup>32</sup> In 1986, a New York court found that children in foster care must receive, prior to their release from the foster care system, training in independent living skills, including apartment hunting, budgeting, shopping and cooking.<sup>33</sup>

Similarly, the New York City Health and Hospitals Corporation and the City of New York were ordered to comply with a state statute by preparing and implementing, for persons being released from mental hospitals, plans that included assurances that adequate housing would be available.<sup>34</sup>

At the federal level, legal advocates (most prominently the National Law Center on Homelessness and Poverty) have challenged federal agency action and inaction on homelessness legislation, including implementation of the modest statutory requirements of the McKinney Homeless Assistance Act.<sup>35</sup>

"[W]hile the crisis of homelessness has deepened over the past decade, policy responses have become increasingly punitive."<sup>36</sup> More recently, litigation on behalf of homeless clients has become reactive. Lawyers are increasingly finding it necessary

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termination of housing costs).

32. See, e.g., *In re Nicole G.*, 577 A.2d 248, 249 (R.I. 1990); *Hansen v. Department of Soc. Servs.*, 238 Cal. Rptr. 232, 241-42 (Cal. Ct. App. 1987); *Martin A. v. Gross*, 524 N.Y.S.2d 121 (N.Y. Sup. Ct. 1987); *In re P. et al.*, No. 12823 (D.C. Super. Ct. 1988).

33. *Palmer v. Cuomo*, 503 N.Y.S.2d 20, 22 (N.Y. App. Div. 1986).

34. *Heard v. Cuomo*, 567 N.Y.S.2d 594 (Sup. Ct. 1991), *aff'd*, 594 N.Y.S.2d 675 (N.Y. 1993).

35. Pub. L. No. 100-77, 101 Stat. 482 (codified at 42 U.S.C. § 11301 (1997)). Persistent litigation was necessary, for example, to force federal agencies to take seriously the surplus property provisions of the Act, which required that unused federal real property be turned over to homeless service providers. See generally National Law Center on Homelessness and Poverty v. Veterans Admin., 819 F. Supp. 69 (D.D.C. 1993); National Law Center on Homelessness and Poverty v. Veterans Admin., 765 F. Supp. 1 (D.D.C. 1991); *Lee v. Pierce*, 698 F. Supp. 332 (D.D.C. 1988); National Coalition for the Homeless v. Veterans Admin., 695 F. Supp. 1226 (D.D.C. 1988). For litigation to compel enforcement of the McKinney Act's education provisions, see, e.g., National Coalition for the Homeless v. Department of Educ., Civ. No. 87-3512 (D.D.C. 1988) (settlement); *Lampkin v. District of Columbia*, 27 F.3d 605 (D.C. Cir. 1994) (reversing grant of motion to dismiss); *Lampkin v. District of Columbia*, 879 F. Supp. 116 (D.D.C. 1995) (finding statutory violation and ordering injunctive relief); *Lampkin v. District of Columbia*, 886 F. Supp. 56 (D.D.C. 1995) (vacating injunction because the District of Columbia had withdrawn from the McKinney Act program which provided financial assistance and imposed the requirements the plaintiffs sought to enforce).

36. Lois M. Takahashi, *A Decade of Understanding Homelessness in the USA: From Characterization to Representation*, 20 PROGRESS IN HUMAN GEOGRAPHY 291, 291 (1996).

to devote their litigation efforts not to obtaining benefits for homeless clients, but to combatting the "criminalization" of homelessness.<sup>37</sup> With mixed success, they have been fighting statutes, ordinances and policies that criminalize begging<sup>38</sup> and living in public.<sup>39</sup>

## II. SHIFTING IMAGERY: AN INTRODUCTION

Over the last two decades, there has been a shift in the way court opinions reflect the image of homeless people and the assumptions about the causes of their homelessness. The earliest cases depicted the homeless as "derelicts"<sup>40</sup> who had created their own plight by, for example, becoming dependent on drugs

37. See generally Maria Foscarinis, *Downward Spiral: Homelessness and Its Criminalization*, 14 YALE L. & POL'Y REV. 1 (1996) [hereinafter Foscarinis, *Downward Spiral*]; NATIONAL LAW CENTER ON HOMELESSNESS AND POVERTY, MEAN SWEEPS: A REPORT ON ANTI-HOMELESS LAWS, LITIGATION AND ALTERNATIVES IN 50 UNITED STATES CITIES (1996); Harry Simon, *Municipal Regulation of the Homeless in Public Spaces*, in HOMELESSNESS IN AMERICA 149-59 (Jim Baumohl ed. 1996); Robert C. Ellickson, *Controlling Chronic Misconduct in City Spaces: Of Panhandlers, Skid Rows, and Public-Space Zoning*, 105 YALE L.J. 1165 (1996) [hereinafter Ellickson, *Controlling Chronic Misconduct*]; Harry Simon, *Towns Without Pity: A Constitutional and Historical Analysis of Official Efforts to Drive Homeless Persons from American Cities*, 66 TULANE L. REV. 631 (1992); Lorne Sossin, *The Criminalization and Administration of the Homeless: Notes on the Possibilities and Limits of Bureaucratic Engagement*, 22 N.Y.U. REV. L. & SOC. CHANGE 623 (1996).

38. See, e.g., *Young v. New York City Transit Auth.*, 903 F.2d 146 (2d Cir. 1990), cert. denied, 498 U.S. 984 (1990); *Loper v. New York City Police Dep't*, 999 F.2d 699 (2d Cir. 1993); *Chad v. City of Fort Lauderdale*, 861 F. Supp. 1057 (S.D. Fla. 1994); *Benefit v. City of Cambridge*, 424 Mass. 918 (1997) (anti-begging statute violates First Amendment of U.S. Constitution); *Doucette v. City of Santa Monica*, 955 F. Supp. 1192 (C.D. Cal. 1997) (ordinance regulating solicitation survives First Amendment challenge); *Berkeley Community Health Project v. City of Berkeley*, 902 F. Supp. 1084, 1092 (N.D. Cal. 1995) (begging is expressive and is protected free speech under U.S. Constitution), *injunctive relief vacated*, 966 F. Supp. 941 (1997).

39. See, e.g., *Roulette v. City of Seattle*, 850 F. Supp. 1442 (W.D. Wash. 1994), *aff'd*, 97 F.3d 300 (9th Cir. 1996) (rejecting facial challenge to ordinance prohibiting sitting or lying on sidewalk in commercial areas during the day); see also *City of Seattle v. McConahy*, 937 P.2d 1133 (Wash. Ct. App. 1997) (rejecting as-applied challenge to same ordinance); *Pottinger v. City of Miami*, 810 F. Supp. 1551 (S.D. Fla. 1992), *appeal pending*, 76 F.3d 1154 (Fla. 1996); *Church v. City of Huntsville*, No. CIV.A. 93-C-1239-5, 1993 WL 646401 (N.D. Ala. Sept. 23, 1993), *vacated by* 30 F.3d 1332 (11th Cir. 1994); *Tohe v. City of Santa Ana*, 27 Cal. Rptr. 2d 386 (Ct. App. 1994), *rev'd*, 892 P.2d 1145 (Cal. 1995); *Johnson v. City of Dallas*, 860 F. Supp. 344 (N.D. Tex. 1994), *rev'd on standing grounds*, 61 F.3d 442 (5th Cir. 1995); *Joyce v. City and County of San Francisco*, 846 F. Supp. 843 (N.D. Cal. 1994).

40. *Callahan*, *supra* note 2; *Seeley v. State*, 655 P.2d 803, 807-08 (Ariz. Ct. App. 1982) ("inebriates and transients").

and/or alcohol.<sup>41</sup> They were also "helpless,"<sup>42</sup> however, in that their initial voluntary decisions had left them relatively incapable of changing their immediate situation, at least in the short-term. This analysis supported the provision of emergency shelter to protect these individuals from freezing to death on the street.<sup>43</sup>

The "helpless" "derelicts" then began to be viewed as victims of an "unfortunate plight,"<sup>44</sup> of "recurring misfortunes,"<sup>45</sup> or of "economic hard times,"<sup>46</sup> "not morally defective, but victims of an often harsh economic system."<sup>47</sup> Homeless people were portrayed as responding to bad luck or to social and/or physiological forces beyond their control.<sup>48</sup> If some had initially contributed to causing their own problems, greater significance was assigned to the involuntariness of their present condition, which they were incapable of changing despite their best efforts.<sup>49</sup> Public sympathy at this stage was at its highest, leading to the enactment of social programs and significant litigation victories.<sup>50</sup>

Lawyers made conscious litigation decisions to emphasize their view of the helplessness of their homeless clients. One of the lead attorneys in a landmark lawsuit<sup>51</sup> has written that, in response to the City of Miami's treatment of the homeless as

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41. See, e.g., Callahan, *supra* note 2.

42. Callahan, *supra* note 2.

43. Callahan, *supra* note 2 ("[E]very [New York] public official . . . is vitally concerned that no New Yorker (including the Bowery derelicts) freeze to death . . ."); Gary Blasi, *Litigation Concerning Homeless People*, 4 ST. LOUIS U. PUB. L.F. 433, 435 (1985) [hereinafter Blasi, *Litigation Concerning Homeless People*] ("[a] value widely shared . . . is that people ought not freeze to death because they are poor, or crazy, or even because they are alcoholics").

44. Slade v. Koch, 514 N.Y.S.2d 847, 852 (Sup. Ct. 1987), *modified*, 517 N.Y.S.2d 389 (Sup. Ct. 1987).

45. Hodge v. Ginsberg, 303 S.E.2d 245, 250 (W. Va. 1983) (quoting W. VA. CODE § 9-1-1).

46. Pottinger v. City of Miami, 810 F. Supp. 1551, 1564 (S.D. Fla. 1992), *appeal pending*, 76 F.3d 1154 (Fla. 1996).

47. Thrower v. Perales, 523 N.Y.S.2d 933, 935 (App. Div. 1987).

48. See, e.g., Pottinger, 810 F. Supp. at 1563 (homelessness is the result of "various economic, physical or psychological factors that are beyond the homeless individual's control").

49. See Tobe v. City of Santa Ana, 27 Cal. Rptr. 2d 386, 390 (Ct. App. 1994), *rev'd*, 892 P.2d 1145 (Cal. 1995) (citing testimony of homelessness expert Dr. Paul Koegel who stated that "[s]tructural, personal and situational barriers prevent homeless persons from securing housing" and explaining that the loss of housing makes it more difficult to secure and retain new housing and to take advantage of necessary community services).

50. See Daniels, *supra* note 11, at 265 n.24 (1991) (noting public and political support for homeless causes throughout most of the 1980s).

51. Pottinger, 810 F. Supp. 1551.

"criminals worthy of brutal and inhumane treatment . . . [t]he plaintiffs wanted the city to recognize homelessness as a social and economic condition over which the homeless had little genuine control."<sup>52</sup> He urged lawyers to file similar lawsuits, in part "to educate the community about homelessness in an attempt to change public opinion. . . . Litigants must strive to give the homeless a human face, showing them as people deserving of rights and dignity as they struggle against circumstances often beyond their control."<sup>53</sup>

But the lawsuits and the social programs did not succeed in eliminating homelessness, although taxpayers believed very substantial amounts of their money were being spent to achieve that goal. In fact, the problem seemed to be worsening, leading many to wonder whether the source of the problem was within, not outside, the control of homeless individuals themselves.<sup>54</sup> Some even concluded that the programs were responsible for increasing the numbers of homeless people.<sup>55</sup>

One result has been sharp reductions in funding for homelessness programs.<sup>56</sup> Another has been heightened criminalization of homelessness, and increasingly unsuccessful litigation challenges to these initiatives.<sup>57</sup> Judges have become more in-

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52. Benjamin S. Waxman, *Fighting the Criminalization of Homelessness: Anatomy of an Institutional Anti-Homeless Lawsuit*, 23 STETSON L. REV. 467, 470 (1994). In a memorandum submitted to the court by the *Pottinger* plaintiffs, their lawyers asserted that the plaintiffs:

are not homeless by choice, but by compulsion of poverty, due to unemployment, underemployment, and physical and mental disease. There is insufficient free shelter for these thousands who are too poor or ill to secure shelter for themselves . . . . Therefore, the members of the Plaintiffs' class have no choice but to live, and to engage in those acts necessary to maintain life, upon the public streets, sidewalks, alleys, and parks within the city of Miami.

Memorandum in Opposition to Defendant City of Miami's Motion to Dismiss or for Summary Judgment, at 1, *Pottinger*, 810 F. Supp. 1551.

53. Waxman, *supra* note 52, at 472.

54. See LIEBOW, *supra* note 6, at 134 (reporting that a social worker, when asked by a homeless woman how she would find a place to live when she didn't have a job, and couldn't find a job because she didn't have a place to live, and would soon have to leave a homeless shelter because it was closing, replied: "The answer, you'll find, is within you.").

55. See, e.g., Robert C. Ellickson, *The Untenable Case for An Unconditional Right to Shelter*, 15 HARV. J.L. & PUB. POL'Y 17, 33 (1992) ("[O]pen-door shelter policies attracted unexpected numbers of able-bodied entrants, and the shelters apparently fostered dependency."); Robert C. Ellickson, *The Homelessness Muddle*, 99 PUB. INTEREST 45, 45 (Spring 1990) ("[I]ncreases in government shelter programs have increased the count of homeless people.").

56. See, e.g., *supra* note 25 and accompanying text (describing the situation in the District of Columbia).

57. See, e.g., *Joyce*, 846 F. Supp. 843; *Love v. City of Chicago*, No. 96 C 0396, 1996

clined to view homeless individuals as people who not only initially made bad decisions, but who voluntarily make ongoing choices which the law need not respect.<sup>58</sup> The images being reflected in these recent opinions thus convey impressions of homeless litigants as people who have voluntarily chosen their homelessness, making it easier for courts to rule against them.

### A. *Shifting Imagery: Cases in Point: "Derelicts"*

In *Callahan*,<sup>59</sup> widely credited as being the first court opinion to establish a right to shelter for homeless people,<sup>60</sup> a New York trial court judge in 1979 found that the government social service agency defendants had failed in their state constitutional and statutory duty to "house all of the destitute and homeless alcoholics, addicts, mentally impaired derelicts, flotsam and jetsam, and others during the winter months."<sup>61</sup> The judge used the word "derelicts" seven times to refer to the homeless plaintiffs in an opinion of fewer than 900 words. Finding that "every [New York] public official . . . is vitally concerned that no New Yorker (including the Bowery derelicts) freeze to death . . . or starve to death,"<sup>62</sup> he ordered the defendants to submit a plan to provide shelter space and food for an additional 750 of "the

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U.S. Dist. LEXIS 16041 (N.D. Ill. Oct. 23, 1996); *Tobe v. City of Santa Ana*, 892 P.2d 1145 (Cal. 1995). *But see* *Benefit v. City of Cambridge*, 679 N.E.2d 184, 188 n.4 (Mass. 1997). In response to one of the state defendant's rationales for an anti-begging statute as prevention of public "annoyance," the Massachusetts Supreme Judicial Court quoted *Coates v. Cincinnati*, 402 U.S. 611, 615-16 (1971): "[P]ublic intolerance or animosity cannot be the basis for abridgement of . . . [C]onstitutional freedoms." *Id. Cf. Doucette v. City of Santa Monica*, 955 F. Supp. 1192 (C.D. Cal. 1997) (holding ordinance regulating "abusive solicitation" narrowly tailored to serve significant governmental interest in preventing harassment and intimidation).

58. *Love*, No. 96 C 0396, 1996 U.S. Dist. LEXIS 16041.

59. *See Callahan*, *supra* note 2.

60. *See supra* note 14, and sources cited therein.

61. *Callahan*, *supra* note 2. The legal authority for the decision consisted exclusively of a footnote that simply cited a state constitutional provision, a state statute, a city administrative code provision, and a court decision. The constitutional provision was: "The aid, care and support of the needy are public concerns and shall be provided by the state and by such of its subdivisions, and in such manner and by such means, as the legislature may from time to time determine." N.Y. CONST. art XVII, § 1. The statute was: "[E]ach public welfare district shall be responsible for the assistance and care of any person who resides in or is found in its territory and who is in need of public assistance and care which he is unable to provide for himself" N.Y. SOC. SERV. LAW § 62(1) (1992). The court's decision had held that the obligation of each public welfare district to provide assistance and care under the statute was mandatory and not conditioned on reimbursement from the State. *In re Jones v. Berman*, 332 N.E.2d 303, 309-10 (N.Y. 1975).

62. *Callahan*, *supra* note 2.

helpless and hopeless men of the Bowery . . . ."<sup>63</sup>

The judge's image of the homeless plaintiffs in *Callahan* was influenced in part by the testimony of social services public officials, such as the Commissioner of the State Department of Social Services, who had stated that the group to which the plaintiffs belonged was "largely composed of individuals with histories of alcohol abuse, drug abuse, mental disorder or combinations thereof. These conditions are chronic and seriously preclude or prevent independent functioning."<sup>64</sup>

A 1980 federal court opinion provides another example of the image of homeless people as deviants with immediate needs requiring a government response. In a suit challenging a proposal to close a Washington, D.C. homeless shelter, Judge Flannery found it "difficult to imagine a situation involving more egregious irreparable injury."<sup>65</sup> The court held that "the issue of homeless persons is so sensitive, the needs of these people are so great, and their potential deprivation so basic, that the harm to the [City] defendants is greatly outweighed . . . ."<sup>66</sup>

The imagery the judge used to describe the consequences of closing the shelter, however, is revealing: "The public would be better served by having homeless persons housed at night rather than *flushing* these people onto the city streets and forcing them to find shelter and food that is beyond their means to obtain."<sup>67</sup> The public interest was seen in terms of public safety: "[M]any of these people are emotionally unstable . . . [since] to a great extent the problem of homelessness was caused by a lack of support services for those persons released from [the city's mental hospital]."<sup>68</sup> Other homeless individuals "may resort to

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63. *Id.* The litigation was settled two years later, by means of a consent judgment in which the City agreed to provide shelter and board to each homeless man who applied for it provided that "(a) the man meets the need standard to qualify for the home relief program . . . ; or (b) the man by reason of physical, mental or social *dysfunction* is in need of temporary shelter." *Callahan v. Carey*, No. 42582/79, Final Judgment by Consent (N.Y. Sup. Ct., Aug. 26, 1981), reprinted in *THE RIGHTS OF THE HOMELESS* 329, 331 (PLI Litigation & Administrative Practice Course Handbook Series No. 428, 1992) (emphasis added).

64. *Callahan*, supra 2.

65. *Williams v. Barry*, 490 F. Supp. 941, 943 (D.D.C. 1980).

66. *Id.* at 944.

67. *Id.* (emphasis added).

68. *Id.* There is a long-standing debate in the literature about the degree of connection between homelessness and the deinstitutionalization of mental hospital patients. Although this is an important question, relevant to the issues dealt with in this Article, it is beyond the scope of the analysis attempted here to address it fully.

For a recent scholarly article that reviews this debate, rejects "the commonly held view that deinstitutionalization is responsible for homelessness," and considers a "myth"

the theory that "problems suffered and caused by the mentally ill homeless have resulted from American psychiatrists' abandonment" of former patients, see Douglas Mossman, *Deinstitutionalization, Homelessness, and the Myth of Psychiatric Abandonment: A Structural Anthropology Perspective*, 44 SOC. SCI. MED. 71, 71 (1997). Mossman finds that this myth "helps Americans deal more comfortably with the implications of homelessness, lessens the challenge to cultural assumptions that mental illness represents, and justifies a view of individuals as inherently rational whose virtues are always threatened by government and society." *Id.* See also Stephen J. Schnably, *Rights of Access and the Right to Exclude: The Case of Homelessness*, in PROPERTY LAW ON THE THRESHOLD OF THE 21ST CENTURY 553, 556 n.8 (G.E. van Maanen & A.J. van der Walt eds., 1996) (noting the deinstitutionalization/homelessness debate and citing sources on both sides).

For an in-depth argument that deinstitutionalized persons became homeless because of the lack of community-based social support networks available to them upon their release from hospitals, see MICHAEL J. DEAR & JENNIFER R. WOLCH, *LANDSCAPES OF DESPAIR: FROM DEINSTITUTIONALIZATION TO HOMELESSNESS* (1987). See also Arlene Kanter, *Homeless Mentally Ill People: No Longer Out of Sight and Out of Mind*, 3 N.Y.L. SCH. HUM. RTS. ANN. 331 (1986) (discussing community resistance to the creation of residences for the mentally ill and the lack of funding for housing and other services); Michael L. Perlin, *Competency, Deinstitutionalization, and Homelessness: A Story of Marginalization*, 28 HOUS. L. REV. 63 (1991) (arguing that the link between deinstitutionalization and current widespread homelessness is mythical, and questioning the efficacy of reliance on courts to ameliorate the problems of homelessness); Nancy K. Rhoden, *The Limits of Liberty: Deinstitutionalization, Homelessness, and Libertarian Theory*, 31 EMORY L.J. 375 (1982) (asserting that sufficient community facilities for deinstitutionalized individuals were not created in part because of the short-sighted optimism of advocates who failed adequately to estimate the extent of society's negative attitudes toward mentally ill people, the amount of treatment such people would continue to need, and their ability to survive on their own).

Perhaps the most comprehensive and sustained assertion of the connection between deinstitutionalization, psychiatric abandonment and homelessness is E. FULLER TORREY, *NOWHERE TO GO: THE TRAGIC ODYSSEY OF THE HOMELESS MENTALLY ILL* (1988). Torrey's solutions include increased medication and reinstitutionalization. For a debate between Torrey and a civil rights lawyer over the desirability of forced medication of homeless, mentally ill individuals, see E. Fuller Torrey, *Forced Medication is Part of the Cure*, THE NEW PHYSICIAN 34 (Dec. 1986) (for), and Susan Stefan, *The Psychiatric Cure for Homelessness: Wrong Diagnosis, Wrong Treatment*, THE NEW PHYSICIAN 37 (Dec. 1986) (against).

Articles that focus on legal aspects of this issue include Arlene S. Kanter, *Homeless but Not Helpless: Legal Issues in the Care of Homeless People with Mental Illness*, J. SOC. ISSUES, 1989, No. 3, at 91 (refuting as a proposed solution to the problem of the homeless mentally ill more liberal involuntary commitment to mental institutions or outpatient commitment in which courts require unhospitalized patients to receive treatment); Jonathan P. Bach, Note, *Requiring Due Care in the Process of Patient Deinstitutionalization: Toward a Common Law Approach to Mental Health Care Reform*, 98 YALE L.J. 1153 (1989) (arguing that the common law of torts can be used to deter the discharge of mentally ill patients to the streets where the hospital makes no attempt to provide community support); Hedy M. Silver, *Voluntary Admission to New York City Hospitals: The Rights of the Mentally Ill Homeless*, 19 COLUM. L. REV. 399 (1988) (concluding that New York hospitals have a legal obligation to admit and treat homeless people who voluntarily seek admission and who need psychiatric care).

For abstracts of additional sources on this issue, see Beth D. Jarrett & Wes Daniels, *Law and the Homeless: An Annotated Bibliography*, 85 LAW. LIB. J. 463, 513-18 (1993).

crime to satisfy their food, drink, and shelter needs . . . . Others will simply wander the streets at night. Still others will wind up in jail."<sup>69</sup>

### B. *Recurring Misfortune*

Two years after the *Callahan* consent decree, the West Virginia Supreme Court of Appeals held, in *Hodge v. Ginsberg*,<sup>70</sup> that the Commissioner of the State Department of Welfare was required to provide emergency shelter, food and medical care<sup>71</sup> to the homeless residents of the state, a group the court characterized as "lack[ing] the means to maintain a permanent residence, and who therefore are often forced to spend their days and nights on public streets, alleys, riverbanks, and other various outdoor locations."<sup>72</sup>

The plaintiffs were granted this relief because their lawyers convinced the court that homeless individuals were intended beneficiaries of a state adult protective services statute. The act required that services be provided to "incapacitated adults," defined as persons "who by reason of physical, mental or other infirmity [are] unable to independently carry on the daily activities of life necessary to sustaining life and reasonable health."<sup>73</sup>

Using dictionary definitions of "infirmity" as "an unsound unhealthy or debilitated state" and "a defect of personality or weakness of the will,"<sup>74</sup> the court concluded that the statutory term "incapacitated adult" was "intended by the Legislature to encompass indigent persons like the petitioners, who, by reason of the recurring misfortunes of life, are unable to independently carry on the daily activities of life necessary to sustaining life and reasonable health."<sup>75</sup>

Two years after *Hodge*, the wave of sympathy for the homeless that began to be felt in the 1980s<sup>76</sup> was strikingly exemplified by the opinion in *Robbins v. Reagan*.<sup>77</sup> This case dealt with an attempt by a homeless organization, the Community for Creative Non-Violence, to require the federal government to keep open and renovate a building that had been made available to

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69. *Williams*, 490 F. Supp. at 944.

70. 303 S.E.2d 245 (W. Va. 1983).

71. *Id.* at 251.

72. *Id.* at 247.

73. *Id.*

74. *Id.* at 249 (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1970)).

75. *Hodge*, 303 S.E.2d at 250.

76. See *Daniels*, *supra* note 11.

77. 616 F. Supp. 1259 (D.D.C. 1985), *aff'd*, 780 F.2d 37 (D.C. Cir. 1985).



the group for use as a homeless shelter. Referring to the homeless plaintiffs three times as the "truly needy,"<sup>78</sup> Judge Charles R. Richey found the homelessness situation "truly an emergency."<sup>79</sup>

While authorizing the government defendants to begin transferring the shelter residents to other facilities, the court conditioned this authorization on the government's "devising appropriate interim and long range plans to eliminate homelessness in the Nation's Capital, and to provide humane solutions for these needy and in all too many instances *helpless* human beings."<sup>80</sup> The judge warned that he would be "watching and waiting to see what the President of the United States and his associates in the government, as well as the leaders of the private sector, do,"<sup>81</sup> and he instructed that "no less than the President of the United States should treat this as a national emergency, and call upon the captains of industry, health care professionals, members of the medical and psychiatric professions, and others skilled in job training and counseling in order that the full impact of the nation's resources can be brought to bear to eliminate this national disgrace."<sup>82</sup>

### C. *Economic Hard Times*

The prevailing view seems to have shifted by the mid-1980s and early 1990s from one of personal dereliction and misfortune to an image of large-scale helplessness in the face of impersonal, structural forces.<sup>83</sup>

A number of courts concluded that the route to homelessness is a path on which people travel involuntarily, and, consequently, found homeless litigants entitled to legal protections

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78. *Id.* at 1263, 1277, 1279 (quoting President Ronald Reagan).

79. *Id.* at 1279.

80. *Id.* at 1280 (emphasis added).

81. *Id.* at 1263.

82. *Id.* at 1279.

83. Not all court opinions of this era, however, reflected such a benign view. The image of dereliction and danger associated with homeless individuals had not completely disappeared. *See, e.g.,* Spring-Gar Community Civic Ass'n v. Homes for the Homeless, 516 N.Y.S.2d 399 (Sup. Ct. 1987). While constrained by applicable law to find against plaintiffs seeking to prevent a Holiday Inn in their neighborhood from being used to shelter homeless families, the New York trial court described the shelter provider's efforts as "thrust[ing]," "depositing," and "dumping" homeless people into the community. *Id.* at 400. The judge took pains to "recognize[ ] the valid concerns and fears of the community that the establishment of this facility may bring serious ecological, sociological and economic problems affecting the quality of life for the [neighboring] residents . . . ." *Id.* at 405.

unavailable to those who freely chose their condition. In this era, litigants, seen as involuntarily homeless because of economic forces beyond their control, won court victories in such areas as voting rights, eligibility for emergency or safety net public benefits and the "right" to live in public free of punitive treatment by the police.

A federal judge in 1984 invalidated New York City's refusal to register to vote homeless persons who did not reside in homeless shelters.<sup>84</sup> The decision relied heavily on the views of anthropologist Kim Hopper. The court summarized Hopper's testimony:

[F]ifteen years [previously] it would have been relatively simple to define the homeless population because they were a rather homogeneous group of white males in the mid- to late fifties, a third of whom had severe drinking problems . . . . In the late 1960s and early 1970s as a result of the destruction of cheap housing stock due to urban renewal projects, the character of the homeless population changed. By the mid-1970s, in New York City, the homeless were primarily black males who were jobless and by the end of the decade, forty percent of those seeking public shelter stated the lack of a job as the primary reason for their impoverishment.<sup>85</sup>

An additional reason offered by Hopper for the increase in the homeless population in the 1970s, the court reported, was "the policy of 'deinstitutionalization' of those with mental disabilities from the psychiatric institutions."<sup>86</sup>

The court went on to quote directly Hopper's views on the causes of homelessness at that time: "Usually some dislocating event occurred, [such as] loss of a job . . . the precipitating event

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84. *Pitts v. Black*, 608 F. Supp. 696 (S.D.N.Y. 1984). Other successful homeless voting rights cases of this era include: *Committee for Dignity and Fairness for the Homeless v. Tartaglione*, No. 84-3447, 1984 U.S. Dist. LEXIS 23612 (E.D. Pa., Sept. 14, 1984) (Philadelphia); *Collier v. Menzel*, 221 Cal. Rptr. 110 (Ct. App. 1985) (Santa Barbara County); *Walters v. Weed*, 231 Cal. Rptr. 615 (Ct. App. 1986) (Santa Cruz), *review granted & opinion superseded by* 732 P.2d 1072 (1987), *rev'd by* 752 P.2d 443 (1988); and *Board of Election Comm'rs v. Chicago/Gray Area Union of the Homeless*, No. Misc. 86-24 (Cook Co. Cir. Ct. 1986) (Chicago). See also *You Don't Need a Home to Vote*, National Coalition for the Homeless' Voting Rights Campaign, Nov. 4, 1997, <<http://www.nch.ari.net/cases/html>> (summarizing selected federal and state cases on homeless voting rights) (on file with author and the *Buffalo Law Review*). For an analysis of the homeless voting rights cases in the context of the "economic utility" and "personality" theories of property rights, see David L. Rosendorf, Comment, *Homelessness and the Uses of Theory: An Analysis of Economic and Personality Theories of Property in the Context of Voting Rights and Squatting Rights*, 45 U. MIAMI L. REV. 701, 717-22 (1990-1991).

85. *Pitts*, 608 F. Supp. at 699.

86. *Id.* at 699 n.11. See *supra* note 68, and sources cited therein (reviewing literature on this point).

leading to homelessness is eviction, formal or informal in most of the cases."<sup>87</sup>

The administrative difficulties of registering people without readily-ascertainable residential locations were not deemed sufficient to outweigh the plaintiffs' constitutional interest in participating in the electoral process where their lack of a fixed, traditional residence was a result of economic forces beyond their control.

Some courts differentiated among groups of homeless people, implying some were more worthy than others because their condition had been caused by economic forces beyond their control rather than by personal failings. Dealing with a challenge to time limits imposed on emergency assistance, the New Jersey Supreme Court characterized the plaintiffs as

not the familiar single urban dwellers who seek shelter in bus or train stations when the street is inhospitable [but as] drawn from that larger group of relatively intact families in cities and suburbs who receive some public assistance but not enough both to sustain decent housing and meet their other basic needs.<sup>88</sup>

Although the court referred to one individual plaintiff as a woman who "may have herself to blame for many of her problems in that she was drug- and alcohol-dependent,"<sup>89</sup> the decision cites a law review article for the proposition that "homelessness functions not as a freely chosen option but as a tragic, inexorable destiny"<sup>90</sup> and quotes a report of the Commissioner of Human Resources as asserting that the "structural problem of too little affordable housing . . . gives rise to most homelessness."<sup>91</sup>

While the court apparently believed homeless people could be categorized according to the morality of their conduct, the court nevertheless concluded that "[a]ll persons, regardless of fault, are entitled to the basic human needs for shelter and food and it is the obligation of government to ensure that these needs are met."<sup>92</sup>

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87. *Pitts*, 608 F. Supp. at 699-700.

88. *Franklin v. New Jersey Dep't. of Human Servs.*, 543 A.2d 1, 2 (N.J. 1988).

89. *Id.* at 3.

90. *Id.* at 3 (quoting John C. Connell, *A Right to Emergency Shelter for the Homeless Under the New Jersey Constitution*, 18 RUTGERS L.J. 765, 769 (1987)).

91. *Id.* (quoting a report to the state legislature by the Commissioner of the Department of Human Services, Mar. 10, 1988).

92. *Id.* at 10 (citing a report of the Governor's Task Force on the Homeless).

In a case concerning a related issue, the New Jersey Appeals Court referred to homeless individuals as "those who *cannot* help themselves"<sup>93</sup> and who "*cannot* compete for safe, sanitary, and decent shelter."<sup>94</sup> The court held arbitrary and unreasonable a regulation disqualifying individuals for emergency housing assistance if they had an "opportunity to plan" defined exclusively in terms of notice. The court found that many recipients would have "no meaningful opportunity to plan in advance "because the notice period would be insufficient to enable them to locate alternative housing considering the economic means of the family and the availability of affordable alternative housing[.]"<sup>95</sup>

Invalidating a county's practice of terminating general relief benefits for recipients who could not produce a valid address within sixty days, a California appellate court explained that "[t]o the extent a purpose of the challenged regulations may be to encourage general relief recipients to obtain housing, the record does not show as a matter of law the possibility of finding such housing is reasonably realistic as opposed to merely theoretical."<sup>96</sup> The court cited as "[f]actors contributing to increased homelessness in California . . . shortages of housing affordable to low-income persons and the release of patients from state hospital beds in the move to deinstitutionalize the mentally ill."<sup>97</sup>

In the early 1990s, a federal judge in Miami concluded that police treatment of homeless individuals in that city had failed to meet constitutional standards. The court held that:

\* [T]he City's practice of arresting homeless individuals for harmless, involuntary conduct which they must perform in public is cruel and unusual punishment in violation of the Eighth Amendment.

\* [S]uch arrests violate plaintiffs' due process rights because they reach innocent and inoffensive conduct.

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93. *Maticka v. City of Atlantic City*, 524 A.2d 416, 423 (N.J. Super. Ct. App. Div. 1987) (emphasis added).

94. *Id.* at 424 (emphasis added).

95. *Id.* at 425. See also *Massachusetts Coalition for the Homeless*, 661 N.E.2d 1276 (reversing and remanding summary judgment upholding regulation terminating emergency assistance benefits to families who reject three opportunities for "safe, permanent housing," in the absence of fixed standards of housing affordability).

96. *Nelson v. San Diego County Bd. of Supervisors*, 235 Cal. Rptr. 305, 310 (Ct. App. 1987).

97. *Id.* at 310 n.4 (citing a study published by the California Department of Housing and Community Development). Regarding the asserted connection between deinstitutionalization and homelessness, see *supra* note 68.

\* [T]he City's failure to follow its own written procedure for handling personal property when seizing or destroying the property of homeless individuals violates plaintiffs' Fourth Amendment rights.

\* [T]he City's practice of arresting homeless individuals for performing essential, life-sustaining acts in public when they have absolutely no place to go effectively infringes on their fundamental right to travel in violation of the equal protection clause.<sup>98</sup>

Finding that "arresting homeless people for innocent, involuntary acts" was "clearly not the answer to homelessness,"<sup>99</sup> Judge C. Clyde Atkins portrayed homelessness as the result of "various economic, physical or psychological factors that are beyond the homeless individual's control."<sup>100</sup> Refuting the City's argument that the plaintiffs' homelessness was not involuntary in the same sense as that of the recent victims of Hurricane Andrew, the judge asserted that "[a]n individual who loses his home as a result of economic hard times or physical or mental illness exercises *no more control* over these events than he would over a natural disaster."<sup>101</sup>

In reaching his conclusions, the judge relied heavily on the views of a sociologist known for his work on homelessness, Professor James Wright, who had testified (echoing the comments of Kim Hopper in *Pitts*)<sup>102</sup> that "homeless individuals rarely, if ever, choose to be homeless. Generally, people become homeless as the result of a financial crisis or because of a mental or physical illness."<sup>103</sup> "The lack of reasonable alternatives," Atkins paraphrased Wright, "should not be mistaken for choice."<sup>104</sup>

The court's characterization of the plaintiffs as involuntarily homeless was a predicate for its favorable rulings on each of the constitutional counts. This is most explicitly true with respect to the Eighth Amendment cruel and unusual punishment claim.<sup>105</sup>

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98. *Pottinger v. City of Miami*, 810 F. Supp. 1551, 1554 (S.D. Fla. 1992), *appeal pending*, 76 F.3d 1154 (Fla. 1996).

99. *Id.* at 1583.

100. *Id.* at 1563. The judge thus adopted the plaintiffs' lawyers' assertions regarding their clients' lack of choice. See Waxman, *supra* note 52.

101. *Pottinger*, 810 F. Supp. at 1564 (emphasis added).

102. *Pitts*, 608 F. Supp. 696. See also *supra* note 84 and accompanying text.

103. See *Pottinger*, 810 F. Supp. at 1557.

104. *Id.* at 1565.

105. For recent law review commentary on the application of the Eighth Amendment to homeless individuals, see Juliette Smith, *Arresting the Homeless for Sleeping in Public: A Paradigm for Expanding the Robinson Doctrine*, 29 COLUM. J.L. & SOC. PROBS. 293, 295 (1996) (arguing that "the Robinson doctrine should apply to prohibit arrests of the homeless for public sleeping in cities with inadequate shelter space."); Edward J. Walters, Comment, *No Way Out: Eighth Amendment Protection for Do-or-Die Acts of the Homeless*, 62 U. CHI. L. REV. 1619 (1995) (arguing that "punishing homelessness is cruel

Judge Atkins invoked *Robinson v. California*, the U.S. Supreme Court's 1962 opinion that held unconstitutional a statute criminalizing the status of being addicted to the use of narcotics and that distinguished punishment for an involuntary status from punishment for voluntary acts.<sup>106</sup> The court then cited lower court opinions that had invalidated vagrancy laws, based on *Robinson*, as punishing status or condition.<sup>107</sup> Atkins stressed that "voluntariness of the status or condition is the decisive factor."<sup>108</sup>

Turning to *Powell v. Texas*, in which the U.S. Supreme Court, applying *Robinson*, upheld the application of a statute making public drunkenness a crime, Atkins focused on the concurring opinion of Justice White, whose vote was necessary to the Court's judgment.<sup>109</sup> White concurred only because he was not convinced that the defendant's alcoholism compelled him to drink in public. White argued, however, that it would be unconstitutional to apply the statute to "unfortunate[ ]" alcoholics for whom "the public streets may become home . . . because they have no place else to go . . . [and for whom] avoiding public places while intoxicated is . . . impossible."<sup>110</sup>

Citing social science evidence that "homelessness is due to various economic, physical or psychological factors that are beyond the homeless individual's control[,] "<sup>111</sup> and finding that "[t]he harmless conduct for which [the plaintiffs] are arrested is inseparable from their involuntary condition of being homeless," the *Pottinger* court concluded that "arresting the homeless for harmless, involuntary, life-sustaining acts such as sleeping, sitting or eating[,] acts they are forced to perform in public effectively punishes them for being homeless" and is cruel and unusual punishment prohibited by the Eighth Amendment.<sup>112</sup>

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because homeless people are unable to change their position and often unable to comply with the law," that "because of a lack of public shelter, eating facilities, or bathrooms, the [homeless] would die if they did not violate the law," *id.* at 1631, and proposing that "courts must invalidate statutes that offer people no lawful choice but death," *id.* at 1620). See also Ellickson, *Controlling Chronic Misconduct*, *supra* note 37.

106. *Pottinger*, 810 F. Supp. at 1562 (citing *Robinson v. California*, 370 U.S. 660 (1962)).

107. *Id.* (citing *Wheeler v. Goodman*, 306 F. Supp. 58, 64 (W.D.N.C. 1969), *vacated on other grounds*, 401 U.S. 987 (1971) and *Headley v. Selkowitz*, 171 So. 2d 368 (Fla. 1965)).

108. *Id.*

109. *Id.* at 1562-63 (citing *Powell v. Texas*, 392 U.S. 514 (1968)).

110. *Id.* (quoting *Powell*, 392 U.S. at 551) (White, J., concurring)).

111. *Id.* at 1563.

112. *Id.* at 1564. As relief, the court ordered the City to establish two "arrest-free zones" where the City would be enjoined from arresting "homeless people who have no

Similarly, a Texas federal district court held in 1994 that "as long as homeless persons must live in public, their sleeping may not be constitutionally criminalized."<sup>113</sup> The court found that "for a number of Dallas homeless at this time homelessness is involuntary and irremediable[,] and that "[b]ecause being does not exist without sleeping, criminalizing the latter necessarily punishes the homeless for their status as homeless, a status forcing them to be in public."<sup>114</sup> Consequently, the challenged ordinance prohibiting sleeping in public, when applied against homeless individuals, violated the Eighth Amendment under *Robinson's* interpretation of cruel and unusual punishment.<sup>115</sup>

The order of the *Johnson* district court enjoining enforcement of the sleeping ordinance was reversed and vacated, the Fifth Circuit holding that plaintiffs lacked Eighth Amendment standing because they had not been convicted of violating the ordinance.<sup>116</sup> The Court of Appeals opinion, however, did not reach the district court's substantive conclusion on the status issue.

#### D. Lifestyle Choices

Although lawyers were able to win some significant litigation victories by portraying their homeless clients as unfortunate victims of forces beyond their control, this approach had significant risks, and carried the seeds of its own destruction.

The risks of the helplessness strategy are illustrated by recent cases which reflect shifting images of homeless plaintiffs, leading to litigation defeats.<sup>117</sup>

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alternative shelter" for "harmless conduct such as sleeping or eating." *Id.* at 1584.

113. *Johnson v. City of Dallas*, 860 F. Supp. 344, 351 (N.D. Tex. 1994), *rev'd on standing grounds*, 61 F.3d 442 (5th Cir. 1995).

114. *Id.* at 350.

115. *Id.* The court, however, rejected the plaintiffs' Eighth Amendment argument that enforcement against the homeless of other ordinances, such as those prohibiting "the removal of waste from receptacles, coercive solicitation, or trespassing," unconstitutionally punished as *status* rather than *conduct* acts the plaintiffs had asserted were "a necessary correlative of homelessness . . ." *Id.* at 349-50.

116. *Johnson*, 61 F.3d at 445.

117. One explanation for the move from litigation victories to losses may have to do with the shift in litigation context from civil law to criminal law. Criminal liability is heavily oriented toward personal responsibility, and individuals are presumed to be responsible for their illegal behavior. It may, therefore, be more difficult to convince courts of the involuntariness of conduct associated with homelessness in the criminal area. On the other hand, while public benefits statutes facially have based eligibility on the existence of present need and not on the causes of need, established categories of eligibility have depended quite heavily on the perceived distinctions between the "worthy" and the "unworthy" poor. *See, e.g.,* Peter B. Edelman, *Toward a Comprehensive Antipoverty Strat-*

The transition from sympathy to skepticism is illustrated by the decisions in *Church v. City of Huntsville* issued by the federal district and appellate courts,<sup>118</sup> and in *Tobe v. City of Santa Ana* by the California Court of Appeals and the California Supreme Court.<sup>119</sup>

In *Church*, an Alabama federal district court found that the city of Huntsville had implemented a policy of "isolating and/or removing" its homeless citizens and regularly "harassing, intimidating, detaining or arresting [them] *solely because of their status as homeless persons*, for walking, talking, sleeping, or gathering in parks and other public places . . . ."<sup>120</sup> Among the city's actions were "wholesale removal of homeless people from their places of abode under the state highway bridges," taking and failing to return most of the personal property of homeless people caught in this sweep, police taking homeless individuals beyond the city limits and abandoning them there, and a City Councilman's statement that "those homeless . . . should be 'show[n] . . . the city limits.'"<sup>121</sup>

Without citing any specific constitutional provision or case precedent, the court held that the city had a constitutional duty not to discriminate against the homeless and preliminarily enjoined the city from implementing its policy of isolation, removal, harassment, intimidation, detention and arrest of the homeless plaintiffs.<sup>122</sup>

The Eleventh Circuit, however, vacated the injunction on the merits of the constitutional issue. While finding that the plaintiffs had standing, the court was

unable to agree that [removal of the homeless and their property from under highway bridges was] indicative of a City policy to violate the rights of the homeless. The Constitution does not confer the right to trespass on public lands. Nor is there any constitutional right to store one's personal belongings on public lands.<sup>123</sup>

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egy: *Getting Beyond the Silver Bullet*, 81 GEO. L.J. 1697, 1703-09 (1993); Joel Handler, "Constructing the Political Spectacle": *The Interpretation of Entitlements, Legalization, and Obligations in Social Welfare History*, 56 BROOK. L. REV. 899, 927-31 (1990).

118. No. CIV.A.No. 93-C-1239-S, 1993 WL 646401, at \*2 (N.D. Ala. Sept. 23, 1993), vacated and remanded, 30 F.3d 1332 (11th Cir. 1994).

119. *Tobe v. City of Santa Ana*, 27 Cal. Rptr. 2d 386, 389 (Ct. App. 1994), *rev'd*, 892 P.2d 1145 (Cal. 1995).

120. *Church*, 30 F.3d at 1342 (emphasis in original).

121. *Church*, 1993 WL 646401, at \*2.

122. *Id.* at \*1.

123. *Church*, 30 F.3d at 1345.



With respect to the claims of official harassment, the court concluded that much of this consisted of the police arresting homeless persons for public intoxication when they were admittedly intoxicated.<sup>124</sup> Citing *Powell* but not once mentioning *Robinson* or *Pottinger*, the court held that "[t]he Constitution does not exempt the homeless from the laws against public intoxication . . . ."<sup>125</sup> The other claims of harassment were found to be too isolated and too stale, even if they otherwise would have amounted to constitutional violations.<sup>126</sup>

In *Tobe*, homeless individuals challenged the constitutionality of an ordinance prohibiting camping in public under which they had been arrested. The City of Santa Ana had enforced the ordinance by conducting what the Court of Appeal termed a "harassment sweep" of the homeless, who were "handcuffed, transported to an athletic field for booking, chained to benches, marked with numbers, and held for as long as six hours before being released at another location, some for crimes such as dropping a match, a leaf, or a piece of paper or jaywalking."<sup>127</sup> The City's policy was "that the vagrants are no longer welcome in the City of Santa Ana."<sup>128</sup> Its objective was to "clean[] up its neighborhoods and forc[e] out the vagrant population."<sup>129</sup>

The intermediate appellate court's opinion relied heavily on expert testimony from homelessness expert Dr. Paul Koegel,<sup>130</sup> who had stated that:

Structural, personal and situational barriers prevent homeless persons from securing housing. [T]he high cost of housing, lack of affordable housing, competition for what low-cost housing does exist, absence of federally subsidized housing and an insufficient number of shelter beds make it extremely difficult for homeless persons to find housing and es-

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124. *Id.* at 1345 n.7.

125. *Id.* at 1345-46. The court quoted from Justice White's concurring opinion in *Powell*: "A [public intoxication] statute . . . is constitutional insofar as it authorizes a police officer to arrest any seriously intoxicated person when he is encountered in a public place." *Id.* at 1346 n.8 (quoting *Powell v. Texas*, 392 U.S. 514, 554 n.5 (1968) (White, J., concurring in the result)). However, the court ignores Justice White's reference to homelessness.

126. *Id.*

127. *Tobe v. City of Santa Ana*, 27 Cal. Rptr. 2d 386, 389 (Ct. App. 1994), *rev'd*, 892 P.2d 1145 (Cal. 1995).

128. *Id.* at 387 (quoting municipal memoranda from City's Executive Director of Recreation and Community Services to Park Superintendent).

129. *Id.* at 388 (quoting memo to Santa Ana Deputy Manager from City's Executive Director of Recreation and Community Services).

130. Koegel was "co-director of a large study of homelessness and an expert from the Rand Corporation," *Id.*, 27 Cal. Rptr. 2d at 390.

cape homelessness.<sup>131</sup>

In addition to Koegel's testimony, the court considered the declarations of ten homeless individuals living in the Civic Center who were targets of the challenged ordinance. As described by the judge, they included:

\* a 58-year old [man] who became homeless when the truck he used for hauling jobs was stolen. . . . [He] is looking for work.<sup>132</sup>

\* [a] 35-year-old [woman] who is schizophrenic and from a suicidal family. [After being cited under the ordinance she said:] "I didn't have anywhere to go."<sup>133</sup>

\* [a 45-year-old-man who] lost his job a year ago . . . .<sup>134</sup>

\* [a 32-year-old woman who] has been homeless since her mother forced her to leave home.<sup>135</sup>

\* [a man who] generally works as a gardener or in construction, but who becomes homeless when he is out of a job.<sup>136</sup>

"[H]ow can [these] petitioners," asked the court, "satisfy the essential human need for sleep under the camping ordinance? . . . [U]nder this ordinance, . . . petitioners will ultimately be leaving Santa Ana or living in jail [because] [m]ost will have no other alternative."<sup>137</sup>

The City had argued that the homeless petitioners had failed to prove that they were involuntarily homeless. The court dismissed this claim as a "frivolous lawyer's gambit we thought Anatole France had long since put to rest [with his famous reference to the] 'majestic egalitarianism of the law [which] forbids rich and poor alike to sleep under bridges . . . .'"<sup>138</sup>

Citing *Pottinger*, the Court of Appeals held that application to the homeless of the anti-camping ordinance violated the Eighth Amendment's cruel and unusual punishment provision.<sup>139</sup> Applying *Robinson*, the court found that "[h]omelessness, like illness and addiction, is a status not subject to the reach of the criminal law; and that is true even if it involves conduct of an involuntary or necessary nature, e.g., sleeping."<sup>140</sup> Court of Appeal Justice Crosby recalled the question posed by U.S. Su-

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131. *Id.* at 390.

132. *Id.*

133. *Id.* at 391.

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.* at 392.

138. *Id.* at 393 n.10 (quoting ANATOLE FRANCE, *LE LYS ROUGE* ch. 7 (1984)).

139. *Id.* at 393.

140. *Id.*

preme Court Justice William O. Douglas in a law review article: "How can we hold our heads high and still confuse with crime the need for welfare or the need for work?"<sup>141</sup>

The court's bottom line was:

The city . . . may not preclude people who have no place to go from simply living in Santa Ana. . . . To view homeless people in our midst is deeply disturbing in a country of such vast wealth. . . . The attack must be on the cause, not the victims; for they in the main are no more content with their circumstances than anyone else is.<sup>142</sup>

But the California Supreme Court reversed, holding the ordinance valid on its face and finding that only a facial challenge had been perfected.<sup>143</sup> The court said it was unable to "conclude that the city intends to enforce the ordinance against persons who have no alternative to 'camping' or placing 'camp paraphernalia' on public property."<sup>144</sup> The justices cited as support the comments made at oral argument by a senior deputy district attorney to the effect that "a necessity defense might be available to 'truly homeless' persons [and that] prosecutorial discretion would be exercised."<sup>145</sup>

In endorsing the implication that many persons subject to the ordinance would not "have no alternative"<sup>146</sup> or be "truly homeless,"<sup>147</sup> the court implicitly rejected the notion underlying court opinions finding most homelessness a result of forces beyond the control of homeless individuals.<sup>148</sup>

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141. *Id.* at 394 (quoting William O. Douglas, *Vagrancy and Arrest on Suspicion*, 70 YALE L.J. 1, 12 (1960), cited in *Parker v. Municipal Judge of City of Las Vegas*, 427 P.2d 642, 644 (Nev. 1967)).

142. *Id.* at 395 n.15.

143. *Tobe v. City of Santa Ana*, 892 P.2d 1145, 1150 (Cal. 1995).

144. *Id.* at 1155 n.8.

145. *Id.* Justice Mosk, in dissent, reasoned that the question of voluntariness was complex and ultimately irrelevant, given the lack of presently-available services for homeless individuals.

We need not inquire into the "voluntariness" of all the acts or decisions that might have led [the homeless petitioners] to their current plight. As many of the briefs and expert submissions point out, the questions whether the homeless . . . are "voluntarily" living in the streets is complex. Even when services or welfare benefits are available, it may be beyond the resources of many [mentally ill and substance-addicted] homeless persons to avail themselves of such assistance. In any event, in light of the shortage of services and beds for the homeless . . . the question of "voluntariness" is almost academic.

*Id.* at 1173 n.8.

146. *Id.* at 1155 n.8.

147. *Id.*

148. See also *Dowell v. Comm'r of Transitional Assistance*, 677 N.E.2d 213, 214 n.2 & 215 (Mass. 1997) (rejecting facial challenge to regulation rendering ineligible for emer-

The ideas that much homelessness is "voluntary," and that homeless individuals should therefore look to themselves rather than to the courts for resolution of their problems, have also recently been adopted by federal judges ruling on a status crime challenge to law enforcement efforts directed toward people living in public<sup>149</sup> and on a Fourth Amendment challenge to the destruction of homeless individuals' property.<sup>150</sup>

In *Joyce*, homeless plaintiffs challenged San Francisco's Matrix Program, which aggressively enforced certain "quality of life" ordinances<sup>151</sup> against persons living in public, and thus allegedly unconstitutionally penalized homeless persons for engaging in life-sustaining activities. Denying a preliminary injunction, the federal district court noted with apparent approval the City's contention that many of the targeted homeless individuals had refused social services offered as part of the City's program.<sup>152</sup>

The court further seemed receptive to the City's argument that each of the plaintiffs was not "actually homeless."<sup>153</sup> This conclusion was reached because the plaintiffs included people who, according to the City, had:

- \* declined to live with a daughter because she could not afford to shelter him
- \* found housing unsatisfactory that had been offered by a housing clinic
- \* claimed none of his acquaintances was a suitable roommate
- \* refused to sleep at a drop-in shelter because of fear of the inhabitants
- \* been suspended from public assistance payments for missing appointments
- \* currently had housing and had been "on the streets for at most a few nights."<sup>154</sup>

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gency assistance benefits families who had "rendered [themselves] homeless . . . due to an eviction from public and/or subsidized housing for nonpayment of rent" although the regulation may result in denial of benefits to families who were not at fault for their homelessness).

149. *Joyce v. City and County of San Francisco*, 846 F. Supp. 843 (N.D. Cal. 1994).

150. *Love v. City of Chicago*, No. 96 C 0396, 1996 U.S. Dist. LEXIS 16041 at \*5 (N.D. Ill. Oct. 23, 1996).

151. An intra-departmental police memorandum explaining the program directed vigorous enforcement of ordinances prohibiting trespassing, public inebriation, urinating or defecating in public, removal or possession of shopping carts, solicitation on or near a highway, erection of tents or structures in parks, obstruction and aggressive panhandling, in an effort to address a "type of behavior [which] tends to make San Francisco a less desirable place in which to live, work or visit." *Joyce*, 846 F. Supp. at 846.

152. *Id.* at 847.

153. *Id.* at 849.

154. *Id.* at 849-50.

Explicitly disagreeing with *Pottinger's* application of *Robinson*, Judge Jensen held for preliminary injunction purposes that it was unlikely plaintiffs would be successful in arguing that homelessness is a status and that acts derivative of such a status are protected from criminal sanction.<sup>155</sup> Jensen characterized as "sheer speculation" the conclusion that the outcome in *Powell* would have been different if the defendant had been homeless, calling Justice White's statements in concurrence "dicta," and questioning whether White would have voted differently in *Powell* had the defendant been homeless.<sup>156</sup>

"As an analytical matter," Jensen wrote, "homelessness is not readily classified as a 'status[,]'" as compared to "age, race, gender, national origin and illness[,] characteristics he associated with "involuntariness of the acquisition (including the presence or not of that characteristic at birth)," citing *Robinson*, "and the degree to which an individual has control over that characteristic . . . . [T]he ability to eliminate one's drug addiction as compared to one's homelessness is a distinction in kind as much as in degree."<sup>157</sup>

In a subsequent opinion certifying a class in the same case, the judge further noted the City's argument that the decision of one of the plaintiffs "not to spend the money he has [\$300 a month in charitable contributions] on housing compromises his 'involuntariness' claim . . . ."<sup>158</sup>

In *Love*, a federal district court rejected, for preliminary injunction purposes, a constitutional challenge to the City of Chicago's practice of seizing or destroying property belonging to homeless people living in public. Faced with a Fourth Amendment claim by homeless plaintiffs whose property had been seized or destroyed by city employees during "cleanings" of the areas in which they were living, Judge Wayne R. Anderson made a factual finding that "[m]ost of the homeless individuals involved in this lawsuit, at least those who are not mentally ill, appear to be choosing homelessness."<sup>159</sup> This assertion was based

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155. *Id.* at 856. The court referred to the *Tobe* Court of Appeal's conclusion that homelessness is a status as based on "an abbreviated policy analysis" with "citations to *Robinson* and *Powell* [that] were no more than ornamental." *Id.* at 856, n.7. The opinion also notes that the *Church* district court's similar conclusion of unconstitutionality neither "cites to a single case or engages in any analysis . . . ." *Id.* at 856 n.8.

156. *Id.* at 857. Jensen noted that White had dissented in *Robinson*.

157. *Id.*

158. *Joyce v. City and County of San Francisco*, 30 Fed. R. Serv. 3d 907, 1994 WL 443464, at \*2 (N.D. Cal. Aug. 4, 1994).

159. *Love v. City of Chicago*, No. 96 C 0396, 1996 U.S. Dist. LEXIS 16041 at \*7 (N.D. Ill. Oct. 23, 1996).

in part on testimony regarding the city's efforts to obtain shelter for the plaintiffs,<sup>160</sup> and despite testimony from plaintiffs' expert witness, University of Chicago Social Services Professor Michael Sosin, regarding "the causes of homelessness and the voluntariness of the decision to live on the streets."<sup>161</sup>

The court concluded, as a matter of law, that the City did not

have an obligation to ensure the safety of property that people voluntarily leave on the City's property, or on . . . private property. . . . The City is not an insurer for the property of people who choose to live on City property rent-free, nor is the public required to accommodate totally the life-style choices made by homeless individuals. . . . The choice of the homeless to live in the [area from which their belongings were being taken] includes the assumption of the risk that their property may be lost. . . . If a person has something valuable . . . and chooses not to carry it on his person, the chance will always exist that it will disappear or be taken because life is not risk-free.<sup>162</sup>

### III. IS HOMELESSNESS "VOLUNTARY?"

Yes, life is a continuous and endless series of choices for everyone. Homeless individuals do make decisions about their lives, and it is fruitless and perhaps harmful to assert otherwise. Advocates should consider abandoning the argument that the behavior of homeless people is "involuntary," and instead focus on the scope and the nature of the alternatives available to those individuals. Advocates may conclude that the aim of their legal and/or political efforts should be to expand the scope and improve the nature of those alternatives.

As the cases discussed above demonstrate, success or failure in litigation on behalf of homeless individuals has depended heavily on convincing courts of the "involuntariness" of the litigants' present condition. Lawsuits are won when judges find homeless people "helpless"<sup>163</sup> and subject to forces "beyond their control."<sup>164</sup> Recent cases are being lost because judges are convinced that homelessness is a "lifestyle choice."<sup>165</sup>

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160. *Id.* at \*5-7.

161. The court's opinion merely mentions that Sosin testified on these issues, without characterizing the content of his testimony. *Id.* at \*4.

162. *Id.* at \*14-16.

163. *Callahan*, *supra* note 2.

164. *Pottinger v. City of Miami*, 810 F. Supp. 1551, 1564 (S.D. Fla. 1992), *appeal pending*, 76 F.3d 1154 (Fla. 1996)

165. *Love v. City of Chicago*, No. 96 C 0396, 1996 U.S. Dist. LEXIS 16041 at \*5

Judges seem to think, and lawyers seem to believe they have to convince judges that homelessness is either "voluntary" or "involuntary."<sup>166</sup> This is a false dichotomy. For most homeless people, there are significant elements of both agency and compulsion in the decisions they make. It may be that for many, homelessness is at some level "voluntary." But the range of choices available to homeless individuals may be so narrow and so unsatisfying that a condition many of us cannot imagine being freely chosen is indeed the least of all possible evils.

"Far from the socially disorganized, disaffiliated, and disempowered misfits that they are often made out to be . . . [homeless people] make rational if unorthodox choices based on the circumstances of their lives . . . ."<sup>167</sup>

When a homeless person is found on the street rather than in a dangerous homeless shelter,<sup>168</sup> "abandonment quality" hous-

(N.D. Ill. Oct. 23, 1996).; see generally *Joyce v. City and County of San Francisco*, 846 F. Supp. 843 (N.D. Cal. 1994).

166. Great Britain has created a statutory distinction between voluntary and involuntary homelessness. Section 191 of the Housing Act of 1996 states:

(1) A person becomes homeless intentionally if he deliberately does or fails to do anything in consequence of which he ceases to occupy accommodation which is available for his occupation and which it would have been reasonable for him to continue to occupy . . . .

(3) A person shall be treated as becoming homeless intentionally if—

(a) he enters into an arrangement under which he is required to cease to occupy accommodation which it would have been reasonable for him to continue to occupy, and

(b) the purpose of the arrangement is to enable him to become entitled to assistance under this Part, and there is no other good reason why he is homeless.

(4) A person who is given advice or assistance under section 197 (duty where other suitable alternative accommodation available), but fails to secure suitable accommodation in circumstances which it was reasonably to be expected that he would do so, shall, if he makes a further application under this Part, be treated as having become homeless intentionally.

The 1996 Act expanded the definition of intentional homelessness that had existed in a prior version, § 60 of the Housing Act 1985. See General Note to § 191, 21 HALSBURY'S STATUTES OF ENGLAND AND WALES: CURRENT STATUTES SERVICE 317 (4th ed., 1997).

The Housing Act 1996 generally weakened the statutory right to permanent housing for homeless individuals in Great Britain. Ellen Malos & Gill Hague, *Women, Housing, Homelessness and Domestic Violence*, 20 WOMEN'S STUD. INT'L F. 397, 398 (1997).

For a discussion of the difficulties this "intentional homelessness" provision has caused for courts and administrative agencies that have tried to interpret it, see IAN LOVELAND, *HOUSING HOMELESS PERSONS: ADMINISTRATIVE LAW AND THE ADMINISTRATIVE PROCESS* 193-221 (1995). See also PETER ROBSON & MARK POUSTIE, *HOMELESS PEOPLE AND THE LAW* 151-235 (3d ed. 1996).

167. Robert Desjarlais, *Some Causes and Cultures of Homelessness*, 98 AM. ANTHROPOLOGIST 420, 421 (1996) (reviewing DAVID WAGONER, *CHECKERBOARD SQUARE: CULTURE AND RESISTANCE IN A HOMELESS COMMUNITY* (1993)).

168. See *Pottinger*, 810 F. Supp. at 1580:

ing<sup>169</sup> or a psychiatric hospital,<sup>170</sup> that person's present condition may reflect affirmative decision-making.<sup>171</sup> That person's situation might not meet the test of "voluntariness" applied in court decisions.

But what does it mean to say that the person has "voluntarily" made a "choice?"

### A. Social Science

What does social science research tell us about the extent to which homelessness is "voluntary?" Does it support a theory of homelessness as the exercise of personal agency in a world of very limited, destructive and debilitating alternatives?

Most research on homelessness, one social scientist has asserted, has "consisted of . . . surveyesque, funding-driven research reports . . ." <sup>172</sup> Studies that focus on "the distribution of characteristics and personal deficits among homeless people" have predominated over those that analyze the "structural and macroeconomic phenomena that have produced so many very poor people."<sup>173</sup> Different approaches, however, are beginning to appear in the literature.

One recent work by three sociologists uses "an 'extended case method' approach to the macrolevel causes of homelessness

[E]ven where there is available space in a shelter, it may not be a viable alternative, 'if, as is likely, the shelter is dangerous, drug infested, crime-ridden, or especially unsanitary. . . . Giving one the option of sleeping in a space where one's health and possessions are seriously endangered provides no more choice than does the option of arrest and prosecution.'

*Id.* at n.34 (quoting Paul Ades, *The Constitutionality of "Antihomless" Laws: Ordinances Prohibiting Sleeping in Outdoor Public Areas as a Violation of the Right to Travel*, 77 CAL. L. REV. 595, 620 n.183 (1989)).

169. See John M. Quigley, *The Homeless*, 34 J. ECON. LITERATURE 1935 (1996) (reviewing BRENDAN O'FLAHERTY, *MAKING ROOM: THE ECONOMICS OF HOMELESSNESS* (1996)). Quigley writes: "The richest, rational, utility maximizing, homeless person is just indifferent between 'abandonment quality' housing at its market-determined rent and homelessness at zero rent." *Id.* at 1937.

170. See *Michael O's Story*, in *CRY OF THE INVISIBLE: WRITINGS FROM THE HOMELESS AND SURVIVORS OF PSYCHIATRIC HOSPITALS* 25 (Michael A. Susko ed. 1991) ("The streets are better than the [psychiatric] hospital. . . . You don't have needles shot into you. If you run into a tangle on the streets you can move away from it. Here, you can't.").

171. See also ROB ROSENTHAL, *HOMELESS IN PARADISE: A MAP OF THE TERRAIN* 64 (1994) (reporting the comment of a homeless woman who had been dropped from the SSI disability benefit program during the Reagan administration's draconian eligibility review: "I tried prostitution . . . . I never in the world would have thought of doing anything like that under normal circumstances. But, I mean, what else could I do? Welfare's not there for me any more.").

172. Desjarlais, *supra* note 167, at 420.

173. Blasi, *And We Are Not Seen*, *supra* note 9, at 579.



in order to combine a 'structural approach to homelessness' with an ethnographic attentiveness to 'the concrete experience' of being homeless.<sup>174</sup> The authors assert that "homelessness is not a result of 'faulty people'—those suffering mental illness or alcoholism or from broken homes—or of 'faulty values' . . . ."<sup>175</sup> Rather, the causes are structural,

rang[ing] from a growing shortage of affordable housing in urban settings to a decline in jobs that keep many families and individuals above the poverty line . . . . [P]overty . . . is the crux of the matter . . . . [S]tructural conditions lead to poverty, which, when tinged with bad luck, causes homelessness, which in turn prompts other problems, like mental instability and drinking.<sup>176</sup>

Anthropologist I. Susser situates homelessness within a phenomenon of "increasing inequality and poverty generated within the global economy of advanced capitalism."<sup>177</sup> Susser sees "[h]omeless populations [as] one of the few highly visible and public signs of the increasing poverty of millions of Americans. They have emerged as a symbol of the new poverty . . . ."<sup>178</sup>

Still, there remain

a significant number of social scientists who believe that individual vulnerabilities or deficits constitute the primary cause [of homelessness]. Researchers argue, for example, that mental instability, substance abuse, criminal history, spousal abuse, family instability, veteran status and other personal vulnerabilities lead to, or substantially intensify, homeless episodes.<sup>179</sup>

174. Desjarlais, *supra* note 167, at 420 (quoting DOUG TIMMER ET AL., *PATHS TO HOMELESSNESS: EXTREME POVERTY AND THE URBAN HOUSING CRISIS* (1994)).

175. *Id.*

176. Desjarlais, *supra* note 167, at 420-21. See also Takahashi, *supra* note 36, at 293 ("[S]tructural trends have exacerbated individual vulnerability to becoming homeless, resulting in a growing population at risk").

177. I. Susser, *The Construction of Poverty and Homelessness in U.S. Cities*, 25 ANN. REV. ANTHROPOLOGY 411, 411 (1996).

178. *Id.* at 412.

179. Takahashi, *supra* note 36, at 295 (citing Lillian Gelberg et al., *Mental Health, Alcohol and Drug Use, and Criminal History Among Homeless Adults*, 145 AM. J. PSYCHIATRY. 191 (1988); S. Martin Taylor et al., *The Housing Experience of Chronically Mentally Disabled Clients in Hamilton, Ontario*, 33 CAN. GEOGRAPHER 58 (1988); David Wood et al., *Homeless and Housed Families in Los Angeles: a Study Comparing Demographic, Economic, and Family Function Characteristics*, 80 AM. J. PUB. HEALTH 1049 (1990); Robert E. Drake et al., *Homelessness and Dual Diagnosis*, 46 AM. PSYCHOLOGIST 1149 (1991); Marjorie J. Robertson, *Homeless Women with Children*, 46 AM. PSYCHOLOGIST 1198 (1991); Ezra S. Susser et al., *Childhood Antecedents to Homelessness in Psychiatric Patients*, 148 AM. J. PSYCHIATRY 1026 (1991); B.C. Wietzman et al., *Predictors of Shelter Use*

In fact, "[s]ome put this argument even more strongly, indicating that the homeless person her or himself, because of alcohol, drugs and mental illness, constitutes the root cause of homelessness."<sup>180</sup>

Sociologists Anne B. Shlay and Peter H. Rossi reviewed, as of the early 1990s, "contemporary social science research on homelessness."<sup>181</sup> With respect to the causes of homelessness, the authors characterized the existing state of research as suggesting a "convergence of many factors . . . including housing market dynamics, housing and welfare policy, economic restructuring and the labor market, and personal disabilities."<sup>182</sup> They noted the debate in the literature about whether research should focus on "structural forces that permit homelessness to occur or the immediate reasons why people become homeless."<sup>183</sup>

The debate that has taken place in courts over the "voluntariness" of homelessness tracks this social science literature, even though judges relatively rarely explicitly cite to that literature in their opinions. The views expressed in judicial opinions implicitly reflect judges' understanding of the state of social science learning regarding homelessness. This understanding is informed to a great extent by briefs and testimony made available to courts by lawyers.<sup>184</sup> It rests on the false dichotomy that as-

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*Among Low-Income Families: Psychiatric History, Substance Abuse, and Victimization*, 82 AM. J. PUB. HEALTH 1547 (1992); C.L.M. Caton et al., *Risk Factors for Homelessness Among Schizophrenic Men: A Case Control Study*, 84 AM. J. PUB. HEALTH 265 (1994); and Diane Hartz et al., *Correlates of Homelessness Among Substance Abuse Patients at a VA Medical Center*, 45 HOSP. & COMM. PSYCHIATRY 491 (1994)).

180. *Id.* (citing ALICE S. BAUM & DONALD W. BURNES, A NATION IN DENIAL: THE TRUTH ABOUT HOMELESSNESS (1993)). *But see* Quigley, *supra* note 169, at 1938 (increased availability of crack cocaine is not a significant factor in the increased incidence of homelessness, and may even have been "an ameliorating factor" because its low cost compared to other drugs would free more income for housing).

181. Anne B. Shlay & Peter H. Rossi, *Social Science Research and Contemporary Studies on Homelessness*, 18 ANN. REV. SOC. 129, 129 (1992). Shlay and Rossi comprehensively surveyed the social science literature, including some sixty local and national data collection studies conducted from 1981 to 1988. *Id.* at 134. The authors concluded that there was great diversity among the homeless. There were, however, characteristics shared by most or many homeless individuals. These included youth; single marital status; severe chronic problems including mental illness, alcoholism, physical disabilities, and poor health; criminal history; history of foster care; and long-term unemployment. "All suffer from economic deprivation." *Id.* at 129-30.

182. *Id.* at 130.

183. *Id.*

184. *See, e.g.*, the assertions regarding homeless persons' lack of choice made by the Pottinger lawyers in Memorandum in Opposition to Defendant City of Miami's Motion to Dismiss or for Summary Judgment, *Pottinger v. City of Miami*, 810 F. Supp. 1551 (S.D. Fla. 1992), *appeal pending*, 76 F.3d 1154 (Fla. 1996) (No. 88-2406), and the correspond-

sumes homelessness is either "voluntary" or "involuntary."

### B. *Public Opinion*

Researchers have concluded that contemporary public opinion closely parallels the prevailing view among scholars that "the causes of homelessness are complex and include both structural and individual factors."<sup>185</sup>

There is "a strong tendency for the public to link homelessness to deviant status."<sup>186</sup> A majority (53.5%) of people surveyed in 1990 agreed with at least one of the following statements: homeless people are "more dangerous than other people," are "more likely to commit violent crimes than other people," or "should be kept from congregating in public places in the interest of public safety."<sup>187</sup> More than one-third (37.1%) thought "homelessness frees a person from worries that other people

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ing conclusion adopted by the judge in that case. Although an in-depth study of the briefs and testimony presented to courts in cases involving homeless litigants is beyond the scope of this Article, such a study would be valuable. Among the many questions it could inform are: what are the bases on which judges form their sociological conclusions regarding homelessness; who are the most influential scholars; what are the most influential schools of thought; and how do shifts in assumptions about the nature and causes of homelessness in the social science community translate conceptually and temporally into lawyers' arguments and judicial opinions?

185. Bruce G. Link et al., *Public Attitudes and Beliefs about Homeless People*, in HOMELESSNESS IN AMERICA 143, 146 (Jim Baumohl ed. 1996) (report of a survey conducted in 1990). See also Paul A. Toro & Dennis M. McDonell, *Beliefs, Attitudes, and Knowledge About Homelessness: A Survey of the General Public*, 20 AM. J. COMMUNITY PSYCHOL. 53 (1992) (report of a survey conducted in 1989-1990); Barrett A. Lee et al., *Images of the Homeless: Public Views and Media Messages*, 2 HOUSING POL'Y DEBATE 649 (1991) (reporting data from four telephone surveys conducted 1987-1990 and from a review of media coverage of homelessness 1980-1990).

186. Link, *supra* note 185, at 144. The authors use the term "deviant status" to include addiction to drugs or alcohol (the average respondent believed 54.5% of homeless people fit this description), having been in jail or prison (45.1%), and being mentally ill (31.5%). The researchers found that 90.8% of their survey respondents thought drug and alcohol abuse contributed to homelessness. *Id.* at 144-45. 72.1% identified "irresponsible behavior" of the homeless themselves as a contributing factor. *Id.* at 146. A 1995 Gallup Organization nationwide survey for the Los Angeles Mission reported public opinion rating alcoholism almost equally with lack of affordable housing as major causes of homelessness. THE GALLUP ORGANIZATION, HOMELESS BUT NOT HOPELESS (1995). In 1992, a Gallup/Los Angeles Mission survey of the homeless in Los Angeles reported that the homeless themselves believe the major causes of their homelessness were: "(1) Alcohol or drugs; (2) Lost or can't find a job; (3) Economy; (4) Can't afford housing." *Education is Not Necessarily a Ticket Out of Poverty, Reports New Gallup/Los Angeles Mission Homeless Opinion Survey*, LOS ANGELES MISSION NEWS (Los Angeles Mission, Los Angeles, CA) Dec. 15, 1992, at 3.

187. Link, *supra* note 185, at 145.

have about jobs and families.”<sup>188</sup>

Large percentages of opinion poll respondents have favored “criminalization” solutions, including involuntary hospitalization of mentally ill homeless people (favored by 86.6%),<sup>189</sup> and prohibitions on panhandling (69.9%),<sup>190</sup> setting up temporary shelter in public parks (69.1%)<sup>191</sup> and sleeping overnight in public places (50.8%).<sup>192</sup>

At the same time, a very high percentage of the public also believes that important causes of homelessness include structural factors related to housing (81.7%),<sup>193</sup> the economic system (79.1%),<sup>194</sup> and a lack of government aid (73.8%).<sup>195</sup> The vast majority have “feelings of sadness and compassion for homeless people (85.8%) and say they feel angry that so many are homeless in a country as rich as the United States.”<sup>196</sup>

There is also very widespread support for federal government action in a number of areas: free drug and alcohol treatment (83.1%), additional public housing (78.9%), tax breaks for private developers of housing for poor people (76.1%), rent subsidies for homeless people (73.3%), a higher minimum wage (69.7%) and even, in a climate of “welfare reform,” increased welfare benefits for homeless people (54.4%).<sup>197</sup>

Social scientist Lois Takahashi has argued that “[t]he support often found in public opinion polls for increased public spending to alleviate homelessness can be traced in part to the growing acceptance that homelessness is not caused solely by the personal deficits of individuals, but is the result of multiple factors, largely structural in nature.”<sup>198</sup> She cites “[r]ecent attitudinal studies in the [United States that] have indicated that there is a wider acknowledgement among the populace that homelessness derives in large part from structural and institutional changes which homeless individuals could not control.”<sup>199</sup>

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188. *Id.* at 146.

189. *Id.* at 147.

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.* at 146.

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.* at 146-47.

198. Takahashi, *supra* note 36, at 293 (citing Barrett A. Lee et al., *Are the Homeless to Blame? A Test of Two Theories*, 33 Soc. Q. 535 (1992) [hereinafter Lee et al., *Are the Homeless to Blame?*]).

199. Takahashi, *supra* note 36, at 301 (citing Lee et al., *Are the Homeless to Blame?*, *supra* note 198, and Toro & McDonnell, *supra* note 185).

Nevertheless, according to Takahashi, "there remains the perception that many homeless persons are to some degree personally responsible for their becoming homeless or, more importantly, for their remaining homeless."<sup>200</sup> This attitude has led many to act to prevent programs targeted to homeless individuals from being established in their communities, and to dismantle those that already exist.<sup>201</sup>

Takahashi believes that this attitude in turn is attributable in large measure to the ways in which homeless people are represented to the public: a "highly stigmatized understanding of homeless persons . . . [who] continue[] to be associated with laziness, alcoholism, drug abuse, mental disability, criminalism and even perversion."<sup>202</sup> She suggests, then, that the public backlash against homeless individuals and programs associated with them be "understood as the outcome of structural processes which serve to stigmatize and marginalize specific groups."<sup>203</sup>

She finds research lacking in a number of important aspects of representation, including "militancy/homeless empowerment,"<sup>204</sup> defined as organized political action undertaken by homeless individuals themselves.<sup>205</sup> She attributes the lack of research in this area in part to "the portrayal of homeless persons as 'victims' to elicit public sympathy" and to promote public funding for programs intended to benefit them, which advocates fear might be threatened by images of organized militancy.<sup>206</sup>

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200. Takahashi, *supra* note 36, at 301.

201. *Id.* at 297.

202. *Id.* at 299 (citing Mary Lou Gallagher, *Homeless—Not Hopeless*, 60 PLANNING 18 (1994)).

203. Takahashi, *supra* note 36, at 299. See also Stephen Loffredo, *Poverty, Democracy and Constitutional Law*, 141 U. PA. L. REV. 1277, 1285 (1993) ("[L]egislative failure to engage in reasoned deliberation [regarding poor people] has produced a politics marked by scapegoating, stereotyping, and stigmatization."); Thomas Ross, *The Rhetoric of Poverty: Their Immorality, Our Helplessness*, 79 GEO. L.J. 1499, 1503 (1991) ("[T]he cultural separation and stigmatization of the poor has been a feature of most Western cultures throughout modern history. . . . [T]he poor . . . have been cast as different, deviant, and morally weak.").

204. Takahashi, *supra* note 36, at 303.

205. *Id.* at 304.

206. *Id.* at 304-05. See *Benefit v. City of Cambridge*, 679 N.E.2d 184, 189 (Mass. 1997) (anti-begging statute is "viewpoint based," and thus a First Amendment violation, "because it favors the view that poor people should be helped by organized [charitable] groups and should not be making public requests for their necessities."). See also Melanie B. Abbott, *Seeking Shelter Under a Deconstructed Roof: Homelessness and Critical Lawyering*, 64 TENN. L. REV. 269, 310 (1997) (asserting that empowerment of the homeless "assumes a level of readiness that many homeless people may not be able to achieve; since they are] attempting merely to survive . . . [they are] unlikely to be ready for relatively sophisticated group process."). But see Virginia Shubert & Mary Ellen

Thus, the substantial reservoir of sympathy apparently felt for homeless people in some respects by the public is undermined by an image of personal fault, of "voluntariness." This stigmatized image persists for the homeless, as it does for other marginalized groups, as a function of their political powerlessness.<sup>207</sup> The faults of those whose voices are not heard are more politically costly.

Homeless advocates (including legal advocates), having identified a tragically oppressed group of people, without an effective voice in the political process,<sup>208</sup> have sought to relieve their suffering by portraying them as helpless victims. But the creation and perpetuation of that image, however well-intentioned, has contributed to a perpetuation of the problem. It has at best evoked charity or benign neglect. Active hostility, if not in the forefront, is always at least in the near background.

Real solutions, based on economic justice, call for a very different kind of advocacy. As Gary Blasi suggests, advocates should be arguing for "rights to a job[,] . . . the economic means to survive . . . [and] decent affordable housing" rather than "the right to sleep in the park and to beg in the subway . . . [and] for the placement in neighborhoods of mass shelters that no one (including homeless people) reasonably wants to live in or near."<sup>209</sup>

### C. *Listening to Homeless People*

Why do homeless people think they are homeless? Published sources reveal a wide variety of views.<sup>210</sup> Steven VanderStaay, who spent six years interviewing "hundreds" of homeless people, notes that "most cite a combination of personal and social factors" to explain their situation.<sup>211</sup> He concludes that "the homelessness described in [his oral history] is at once simple

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Hombs, *Housing Works: Housing Opportunities for Homeless Persons*, 29 CLEARINGHOUSE REV. 740, 749 (1995) (arguing that "[t]he marginalization of homeless persons has meant that 'successful advocacy has required militancy that borders on belligerence.'" (quoting HOUSING WORKS, INC., 1994 STRATEGIC PLAN 6 (1994))).

207. See also Rosendorf, *supra* note 84, at 702 (noting that "individual rights are implicitly defined by property ownership principles.").

208. "Courts have always been used by those who find the balance of political forces against them. . . . The use of the courts often appears to be a less dangerous and less costly means than nonlegal struggles against formidable opponents." JOEL F. HANDLER, *SOCIAL MOVEMENTS AND THE LEGAL SYSTEM* 22 (1978).

209. Blasi, *And We Are Not Seen*, *supra* note 9, at 569.

210. In addition to the sources cited in this Part, see also PHILIP MICHAEL BULMAN, *CAUGHT IN THE MIX: AN ORAL PORTRAIT OF HOMELESSNESS* (1993).

211. VANDERSTAAY, *supra* note 1, at viii-x.

and complex: simple by virtue of the economic shifts and inequities which emerge as the root causes of the crisis, and complex because of the great diversity of personal situations these forces impact."<sup>212</sup> The common denominator in the tales told by homeless people is poverty. "Each [story] is set into motion by a distinct event, but each reaches the street for the same reason: lack of money or other resources of assistance."<sup>213</sup>

VanderStaay writes:

Understanding the balance of personal and societal factors that create homelessness . . . is a delicate act of framing specific stories within larger social and economic contexts. . . . [A]chiev[ing] this balance . . . occurs each time we sit across from someone, open our minds, and listen."<sup>214</sup>

If we listen carefully, we might hear textured and layered stories portraying strength, resourcefulness and courage in a world of adversity many of us can at best only dimly imagine. We might derive essential clues in the search for solutions to the tragedy of homelessness."<sup>215</sup>

Some homeless people attribute their homelessness to personal failings:

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212. *Id.* at ix.

213. *Id.* at 61.

214. *Id.*

215. Vanderstaay suggests what homeless people themselves believe are the solutions:

Homeless people seek solutions that account for their own experience. Persons homeless through loss of work see employment as their greatest need; others stress a safe and affordable home as the foundation upon which they can base other progress. Most recognize that effective drug and alcohol treatment must accompany job assistance and housing programs for people who need it:

[They] cry for help beyond housing—for child care, medical attention, substance-abuse programs, and jobs . . . . [M]any . . . freely admit personal difficulties that complicate their situations . . . . But the idea that people should be punished for behavior they already suffer under makes no sense to homeless people . . . . They are nearly unanimous in wanting to substantially raise the minimum wage, increase support for dependent families, veterans, and the disabled, and in their desire for housing programs that integrate poor families into middle-class neighborhoods. Most see universal health care as an essential human right. They want schools that give a ghetto child a chance, streets that permit safe passage, a war on drugs that cares for the wounded, and job assistance programs that provide jobs, not assistance . . . . [T]he solutions that homeless people suggest not only lack the political homogeneity common to those who speak for them, they point to new ways of thinking about the problem . . . .

VANDERSTAAY, *supra* note 1, at 183-85.

\* [M]e being homeless is due to . . . me not being able to get along with my family.<sup>216</sup>

\* I wasn't able to achieve my high school diploma . . . because I wanted to be with the in-crowd.<sup>217</sup>

\* I became homeless for being neglectful with my children and not having any job skills or even my education. . . . [W]hat had a big play in me becoming homeless is self-sabotaging . . . it's a feeling disease that . . . the majority of the people in the world have . . . low self-esteem, feelings of low self-worth . . . just self-hate. . . . I started leaving my kids alone at home and then I end up losing them.<sup>218</sup>

Others identify as the cause of their homelessness the unavailability of familial and social support:

\* Money is the only difference between someone with no home and who is staying in a motel, or even renting a room at the Y, and someone living on the street or in a shelter. In the same way, indeed, those people who are without a home of their own, but who have a family they can crash with, are spared the stigma of "homelessness."<sup>219</sup>

\* We on the street have long recognized that Social Services operates under the policy of "Don't make it too easy for them." . . . A county caseworker told me that before she could process my application I must bring in receipts from all the people I'd panhandled from so she could total my monthly income. But my personal all-time favorite is "Provide proof of no income."<sup>220</sup>

\* Elliot lives in a dream world. He thinks all those staff people and volunteers were around to give love and help. I found some folks sincere in

216. Nelson Johnson, *Homeless Voices Page*, Oct. 2, 1997, <<http://nch.ari.net>> (Internet site maintained by the National Coalition for the Homeless) [hereinafter *Homeless Voices*] (on file with the *Buffalo Law Review*).

217. Carolyn Wade, *Homeless Voices*, *supra* note 216.

218. Penny Callan, *Homeless Voices*, *supra* note 216.

219. "Kim" (a pseudonym) was one of two homeless women whose comments on the author's text were interspersed in footnotes throughout the book. Here she is commenting on the author's references to three other homeless women, one who "defined her problem as being familyless rather than homeless," another who "defined true homelessness as having no family," and a third who "took the more conventional view that she was homeless because she had no family to prevent her from sliding into it, or, being there, to help her climb out of it." (quoted in LIEBOW, *supra* note 6, at 84).

220. *Id.* at 142 n.\* (Kim, commenting on the author's observation that social welfare policy seems to be based on an assumption that making it "too easy" for the needy poor encourages dependency). See also ROSENTHAL, *supra* note 171, at 64. Rosenthal recalls the comments of a homeless woman on her experiences with the California Department of Social Services office in Santa Barbara:

There was one woman down there, . . . she really made you feel like a piece of shit. I don't know whether they still have that same sort of policy of making you feel so disgusted with it that you decide that you don't want to go through their trip, so you drop off and that's one less person that they have to hassle with.



their efforts to help, others it seemed were there to be congratulated for being a volunteer. . . . The way people in authority treated you sometimes, I thought they were just out to rob me of what little I had left of my self esteem.<sup>221</sup>

In its extreme (but not unusual) form, there is not just a lack of support from those counted on to provide it, but overt abuse:

\* I had to either try to live with [my husband] under the circumstances—which was unbearable—or try to make it on my own. I tried to find a job and a place to stay, but I just couldn't do it in time. And then I was robbed. . . . So I found myself without money or a place to live. And I had to take [my two daughters] with me. I would have been frightened to leave them with him at home. . . . [W]ith children you can't begin to look for a job until you find child care. Then my credit is messed up because of my husband. . . . I don't care to describe it, the things he did to me . . . and I shudder to think what would have happened if there wasn't a place [a battered women's shelter] to go.<sup>222</sup>

\* One thing that did strike me as I began to make friends with the homeless women—all their backgrounds pointed to some form of abuse in their lives as children.<sup>223</sup>

\* There is little I can say here about homeless women as wives. I lived an abused life as a married woman. I nearly lost my mind.<sup>224</sup>

There are those who attribute homelessness to structural economic forces:

\* [I]n Washington [D.C.] there are no . . . strong unions or regulations for putting up . . . government buildings and as a result, we just make enough to basically feed ourselves. . . . And most people are laying people off instead of hiring, there's just no permanent jobs available. . . . So, we go from one temporary situation to another, and never manage to get enough money together . . . to do anything . . . for ourselves in a permanent way. So it's a kind of a self-perpetuating situation.<sup>225</sup>

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221. LIEBOW, *supra* note 6, at 160 n.\* (Grace, commenting on the author's assertion that "[m]any [shelter] staff persons . . . offered consolation, encouragement, advice when asked, and a sympathetic ear.").

222. Marsha, an African-American woman in her thirties (*quoted in* VANDERSTAAY, *supra* note 1, at 168-69).

223. Grace, *in* LIEBOW, *supra* note 6, at 102 n.\* (commenting on the author's statement that "some of the strongest feelings and worst relationships with parents were experienced by those younger women who traced their situations to being forced out of the house by one or both parents or who had chosen homelessness and shelter life over intolerable conditions at home.").

224. *Id.* at 107 (Grace, commenting on the author's statement that "[m]any of the homeless women had been married at one time or another, but most of them had nothing to do with their former husbands.").

225. Mike, a "construction worker, unemployed at the moment," *Homeless Voices*,

\* It's a real tough job . . . to pay the high cost of rent—on minimum wage, or a small pension. . . . [N]owadays with computerization and automation, the whole strata of lower level jobs has been completely eliminated.<sup>226</sup>

\* I didn't mind personal questions. . . . What I did mind was in the course of their asking questions, they then tried to judge me and proceeded to tell me what I did wrong since I now found myself homeless. There was this general consensus, that if you were homeless, you must have caused it to happen. I had paid staff and volunteers tell me what I needed to do, in their opinion, to get myself out of this situation. They told me that I needed to save money! When you are working and making next to nothing, there is no money to save.<sup>227</sup>

And there are those who perceive the confluence of forces that can bring about an individual's homelessness. Listen to a woman named Georgia, writing in an essay she called "Shelter Life:"

What is life like with the confines of the overnight shelter or temporary lodging place for those who have been displaced by society's rules or for some other reason? Some may prefer to use the often-used phrase 'fallen through the cracks.' I would use the word 'displaced.' Whatever word or phrase that one wants to use makes no sense unless one has been there. . . . [T]o apply this 'falling through the cracks' to a whole generation of people is almost unbelievable even to those who have lived this nightmare . . . . Think about it. There would have to be a mighty force behind any group of people to cause so many of them to fall through these cracks. . . . There were many reasons that people became displaced in the decade of the early 1980s. Some of these were: absent husbands, death of a spouse, loss of income, inability to work and baby-sit a small child at the same time, sickness, disability due to illness, evictions because of unemployment, insufficient wages to cover all the necessary expenses. So you starved or you froze. Terrible choices in this land of plenty. . . . According to an article the press wrote when I was homeless, homelessness was brought about by a group of people who were lazy, drunkards, or mentally ill persons. They were folks who were looking for handouts and for someone to take care of them. Basically, those statements were bogus and unfounded in truth.<sup>228</sup>

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*supra* note 216.

226. Paul Dietrich, *Homeless Voices*, *supra* note 216.

227. Grace, in LIEBOW, *supra* note 6, at 137 n.\* (commenting on the author's reference to homeless women's resentment at having to answer personal questions (about sex and drugs, for example), over and over again, as "part of the price they paid for being powerless" and in dire need of subsistence-level assistance).

228. DEBORAH PUGH & JEANIE TIETJEN, *I HAVE ARRIVED BEFORE MY WORDS: AUTOBIOGRAPHICAL WRITINGS OF HOMELESS WOMEN* 127-28 (1997).

## IV. THE ROLE OF LAWYERS

Litigation victories in the early right to shelter and benefits cases were predicated on portrayals of homeless plaintiffs as "helpless and hopeless."<sup>229</sup> Lawyers were able to win cases in jurisdictions where local law could be interpreted to impose affirmative obligations on government to care for the "worthy" poor.<sup>230</sup>

The successful lawsuits provided invaluable (sometimes life-saving) relief to some homeless individuals.<sup>231</sup> But the number of jurisdictions in which such legal claims were available was always quite limited,<sup>232</sup> and even in those jurisdictions, judicial limits are being imposed on the extent to which the claims will be recognized.<sup>233</sup> Many of the benefits have become further compromised as a result of "welfare reform."<sup>234</sup> In addition, where the relief achieved was emergency shelter, it became increasingly apparent that systems of mass, government-provided temporary shelters and welfare hotels were not a long-term (or even a very effective or humane short-term) solution to the problem

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229. Callahan, *supra* note 2.

230. See generally James K. Langdon & Mark A. Kass, *Homelessness in America: Looking for the Right to Shelter*, 19 COLUM. J.L. & SOC. PROBS. 305 (1985); Chackes, *supra* note 23.

231. "[I]n many, if not most, of the communities in which there has been significant public action to address the problem of homelessness, that action has been the product of court orders." Blasi, *Litigation Concerning Homeless People*, *supra* note 43, at 434.

232. See, e.g., *Hilton v. City of New Haven*, 661 A.2d 973, 974-75 (Conn. 1995) (rejecting homeless plaintiffs' claim that the city has a state constitutional obligation to provide shelter).

233. See, e.g., *Mixon v. Grinker*, 669 N.E.2d 819, 820 (1996) (reversing a lower court judgment that would have required New York City to provide "minimally habitable" housing to HIV-ill homeless plaintiffs, by finding immune from judicial review a City program which placed up to twelve HIV-ill homeless individuals in a dormitory environment with common eating and bathroom facilities).

234. Federal "welfare reform" legislation was enacted in 1996. The Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996), eliminates the federal entitlement to welfare benefits, § 103(a), caps the amount the federal government will spend for welfare benefits, *id.*, and provides states broad discretion in using federal block grants, *id.*, while prohibiting states from providing benefits to many unmarried teenage parents, *id.*, to recipients deemed ready for work after twenty-four months, *id.*, to all families after sixty months, *id.*, and to most immigrants, *id.* §§ 401-03, 411-12.

For articles that deal concretely with strategic issues for lawyers in the "welfare reform" environment, see, e.g., Rob Paral, *State-Level Non-Citizen Welfare Policies: Issues for Advocates*, 31 CLEARINGHOUSE REV. 146 (1997); Tanya Neiman, *A Community-Based Response to Welfare Reform*, 31 CLEARINGHOUSE REV. 165 (1997); Alan W. Houseman, *Legal Representation and Advocacy Under the Personal Responsibility and Work Opportunity Reconciliation Act of 1996*, 30 CLEARINGHOUSE REV. 932 (1997).

of homelessness.<sup>235</sup>

As taxpayers wearied of subsidizing programs that seemed both expensive and ineffective,<sup>236</sup> and as local governments devised law enforcement responses, legal advocates found themselves directing their energies to combatting the "criminalization" of homelessness.

Even when criminalization lawsuits are successful, the rights established are negative rights, in that at most they restrict ways in which government can punish homeless people for engaging in certain types of behavior, such as begging or living in public. The courts do not impose affirmative federal constitutional duties on government defendants to address the needs of homeless individuals.<sup>237</sup> And the state can remove the constitutional barrier to official punitive measures, a barrier cognizable only in a context of "involuntary" homelessness, by offering homeless people even the most minimal of alternatives, such as "beds" in emergency shelters, or even a "shelter's floor."<sup>238</sup>

To some extent, establishing negative rights through litigation *has* led some governments to initiate programs to deal with homelessness, and this has been a purposeful strategy for law-

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235. See Maria Foscarinis, *Beyond Homelessness: Ethics, Advocacy and Strategy*, 12 ST. LOUIS U. PUB. L. REV. 37, 42 (1993) [hereinafter Foscarinis, *Beyond Homelessness*] (noting that "[t]he provision of emergency relief [to homeless individuals] . . . has become a permanent operation [and] [a]s emergency measures become entrenched, they become part of the mechanism that may allow homeless people to survive but not to escape their plight."). See generally KOZOL, *supra* note 6 (graphically portraying the horrors of life for homeless families in New York City's welfare hotels).

236. See J. Phillip Thompson, *The Failure of Liberal Homeless Policy in the Koch and Dinkins Administration*, 111 POL. SCI. Q. 639, 658-59 (1996) ("[B]illions of taxpayers' money [was spent] on homeless housing without slowing the rate of family homelessness.").

237. See, e.g., *Church v. City of Huntsville*, No. CIV.A. 93-C-1239-5, 1993 WL 646401, at \*3 (N.D. Ala. Sept. 23, 1993) ("[T]he City . . . is under no constitutional duty to address the problem of its homeless citizens . . ."), *vacated by* 30 F.3d 1332 (11th Cir. 1994); *Johnson v. City of Dallas*, 860 F. Supp. 344, 350, 351 ("The Court does not suggest that the City must provide the homeless with anything. . . . [A]s a matter of constitutional jurisprudence the City is not required to provide shelter or housing to anyone. . . ."), *rev'd in part, vacated in part by* 61 F.3d 442 (5th Cir. 1995); *Pottinger v. City of Miami*, 810 F. Supp. 1551, 1583 (S.D. Fla. 1992), *appeal pending*, 76 F.3d 1154 (Fla. 1996) ("Obviously, the ideal solution would be to provide housing and services to the homeless. However, [this] is a matter for the government . . . to address, not for the court to decide.").

238. See, e.g., *Johnson*, 860 F. Supp. at 350:

There are not enough beds available at the area shelters to accommodate the demand. . . . For many . . . homeless . . . the unavailability of shelter is not a function of choice; it is not an issue of choosing to remain outdoors rather than sleep on a shelter's floor because the shelter could not provide a bed that one found suitable enough.

yers filing "criminalization" lawsuits.<sup>239</sup> It is politically unpopular to allow large numbers of homeless individuals to remain publicly visible. Their obvious presence is believed to harm commerce and tourism.<sup>240</sup> Too often, however, the response is that programs are designed for the purpose of removing homeless people from public view,<sup>241</sup> not with the goal of eradicating the root causes of severe poverty and homelessness.

Even where the intent is to ameliorate the suffering of homeless people, rather than simply to hide them from customers and tourists, the helplessness image leads in the wrong direction. When the cause of the helplessness is conceived as individual weakness, rather than structural inequality, behavior modification is constructed as the cure.<sup>242</sup> This solution is pursued through treatment for addiction and mental illness and through "work incentives" accomplished by means of benefit reduction and elimination.

In some instances, courts have identified larger social and economic forces, considered beyond the control of homeless individuals, as the cause of their homelessness. But the typical po-

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239. See, e.g., Waxman, *supra* note 52. Waxman notes that "[i]f significant strides are to be made in reducing homelessness, large scale [litigation] challenges to the anti-homeless policies of governments and public sector agencies must be initiated." *Id.* at 469. He adds that "[i]f institutional anti-homeless policies are to be eliminated and replaced by thoughtful and effective programs to reduce homelessness consistent with constitutional and statutory rights, more large scale lawsuits like *Pottinger* must be filed and prosecuted." *Id.* at 496.

240. See, e.g., Waxman, *supra* note 52, at 472 ("In Miami, the anti-homeless policy [challenged in the *Pottinger* litigation] was fueled largely by the complaints of local merchants that the unsightly and menacing presence of homeless persons was destroying their businesses."). See also *City of Seattle v. McConahy*, 937 P.2d 1133, 1137 (Wash. Ct. App. 1997) (finding ordinance prohibiting sitting or lying on sidewalks in commercial areas during the day a response to a "legitimate legislative health and safety concern" in part because "shoppers were deterred from coming into [these] areas because petty crime and blight were increasing."); *Joyce v. City and County of San Francisco*, 846 F. Supp. 843, 846 (N.D. Cal. 1994) (describing city's Matrix Program, which aggressively enforced a variety of ordinances against the homeless, as having been instituted following the issuance of a report by the Mayor's Office of Economic Planning and Development that had "attributed to homelessness a \$173 million drain on sales in the City").

241. Schnably, *supra* note 68, at 557 (describing local governments' "invisibility" strategy for dealing with homelessness). See also Susser, *supra* note 177, at 412 ("Political concern for housing the homeless, or at least removing them from the streets and subways, stems from the need to make the increasing inequality to which the majority of the residents are subject invisible, individual, and private."); Ross, *supra* note 203, at 1503 ("[The poor] have been cast as different, deviant and morally weak. These assumptions make coherent the physical separation of the poor from the affluent.").

242. Schnably, *supra* note 68, at 558 (describing local governments' "disciplinary" strategy for dealing with homelessness, which "[requires] the victims to blame themselves as a condition of offering them the help of experts.").

litical response to the rulings in those cases is inconsistent with the courts' sociological conclusions. Emergency shelter, treatment programs and "welfare reform" are not answers to structural economic problems.<sup>243</sup> Yet, judges consider themselves helpless to devise more effective solutions,<sup>244</sup> and they are willing to accept as legally sufficient seriously inadequate programmatic responses.<sup>245</sup>

Even seriously inadequate programmatic responses to homelessness may provide some meaningful, if ultimately short-term, relief to the immediate suffering of some homeless individuals. If litigation can evoke a pain-mitigating response, criticism of those efforts should proceed with caution.<sup>246</sup>

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243. Desjarlais, *supra* note 167, at 421: "[S]helters sustain, rather than alleviate, a state of impoverishment and dependency" (Reviewing *TIMMER ET AL.*, *supra* note 174). See, e.g., *L.T. v. New Jersey Dep't of Human Servs.*, 624 A.2d 990, 993 (N.J. Super. Ct. App. Div. 1993); *Franklin v. New Jersey Dep't of Human Servs.*, 543 A.2d 56, 65 (N.J. Super. Ct. App. Div. 1988); *Spring-Gar Community Civic Ass'n, Inc. v. Homes for the Homeless*, 516 N.Y.S.2d 399, 406 (N.Y. Sup. Ct. 1987). See also Shubert & Hombs, *supra* note 206, at 750 (arguing that "most emergency services and many transitional housing programs, infantilize [homeless] persons by denying them the permanence and stability necessary to establish and maintain a stake in the community.").

244. See *supra* note 237 and cases cited therein; see also Ross, *supra* note 203, at 1499-1501 (analyzing U.S. Supreme Court opinions in constitutional cases involving poor people and concluding that the opinions are replete with rhetoric that assumes eradicating poverty is probably impossible and would at least require radical social transformation well beyond the institutional competence of the judiciary to try to bring about).

245. Even federal Judge C. Clyde Atkins, whose opinion in *Pottinger* represents perhaps the most sweeping example of judicial intervention on behalf of homeless people, has indicated on remand a strong reluctance to evaluate the adequacy of the alternatives presented by government to homeless individuals. Atkins indicated that "the reasonableness of the alternatives presented to involuntarily homeless persons may become relevant at some time in the future," once local government was in a position to claim it was providing emergency shelter spaces sufficient to accommodate all of the city's homeless. However, he cautioned that "[w]hile the court is concerned that homeless people receive appropriate services and are treated with dignity, it is not for the court to judge the efficacy of the [Dade County Homeless] Trust's efforts" in offering services to persons displaced by eradication of the homeless encampments in which they had been living. *Pottinger v. City of Miami*, No. 88-2406-CIV-ATKINS (S.D. Fla. Apr. 7, 1995), slip op. at 8 n.7. See also *Johnson v. City of Dallas*, 860 F. Supp. 344, 350 (N.D. Tex. 1994), *rev'd on standing grounds*, 61 F.3d 442 (5th Cir. 1995) (indicating that space on a "shelter's floor" might be a sufficient alternative to offer a homeless person claiming involuntariness); *Mixon*, 669 N.E.2d at 821 (rejecting the claim that courts can impose on the City of New York a plan that might effectively reduce the chance that HIV-positive homeless individuals would contract infectious diseases in the city shelter system).

246. See, e.g., Stephen Wizner, *Homelessness: Advocacy and Social Policy*, 45 U. MIAMI L. REV. 387, 391 (1991) ("Legal advocates confront homelessness as an emergency condition. It is their task to address individuals' current housing needs, not to devise measures that may become effective for the individual or society in the future."); Blasi, *Litigation Concerning Homeless People*, *supra* note 43, at 442-43 (noting that although

But the true value of litigation should be measured by the extent to which the legal relief granted and the social programs that follow actually and significantly improve the lives of homeless people by dealing successfully with their real problems. The record has not been good.<sup>247</sup> Reflecting on the New York City right to shelter litigation in which he had been so central an actor, Bob Hayes has wondered:

Why in God's name should you go through five years and . . . millions of dollars of legal fees to get a relatively modest victory? And what kind of a victory? [One that has produced a system in which] one thousand human beings sleep[ ] in one room [and] where \$35,000 a year is squandered on a squalid welfare hotel room.<sup>248</sup>

And the more recent cases indicate that the chances of establishing even negative rights may be waning.<sup>249</sup> Assistance programs have developed, to some significant extent, when courts have made unavailable the punitive police solution to

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litigation to address homelessness is "very ineffective and very inefficient . . . sometimes courtrooms are the places of last resort for the most desperate."); Abbott, *supra* note 206, at 308, 313 (urging that "[t]heoretical railing against legitimization [of the existing administrative system] must take a back seat to survival" when "without the 'benefits' provided by the government, many homeless people would die. . . . If litigation will force a city to adhere to statutes requiring that they provide shelter for those in need, that type of litigation must be a priority").

247. See, e.g., Shlay & Rossi, *supra* note 181, at 130 ("Policies designed to ameliorate homelessness have been inadequate to stem the tidal forces that produce such severe destitution, and this trend is likely to continue."); Foscarinis, *supra* note 235, at 39-43 (noting ethical issues facing lawyers working on behalf of homeless people whose efforts might contribute to the "institutionalization" and "legitimization" of homelessness).

For a study of "whether, and under what conditions, courts can produce significant social reform," see GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 336 (1991) (concluding that "attempts to use the courts to produce significant social reform in civil rights, abortion, women's rights, the environment, reapportionment, and criminal rights" were "mostly disappointing."). See also HANDLER, *supra* note 208 (analyzing thirty-five cases in which lawyers attempted to use the legal system to achieve social change in four areas he identifies as environmental litigation, consumer protection, civil rights and social welfare, and concluding, at 22-25, that realization of the benefits of judicial gains was impeded by "[b]ureaucratic hostility" and problems of enforcement of court-ordered remedies).

248.7. Robert M. Hayes, *Homelessness & the Legal Profession*, 35 LOY. L. REV. 1, 8 (1989). Hayes does believe that the litigation resulted in a 'major victory' in that New York City was thereby pressured to spend hundreds of millions of dollars to transform formerly abandoned buildings into livable permanent housing. *Id.* at 9.

249. See generally *Church v. City of Huntsville*, 30 F.3d 1332 (11th Cir. 1994); *Tobe v. City of Santa Ana*, 27 Cal. Rptr. 2d 386 (Ct. App. 1994), *rev'd*, 892 P.2d 1145 (Cal. 1995); *Joyce v. City and County of San Francisco*, 846 F. Supp. 843 (N.D. Cal. 1994); and *Love v. City of Chicago*, No. 96 C 0396, 1996 U.S. Dist. LEXIS 16041 (N.D. Ill. Oct. 23, 1996).

homelessness. Removal of the legal bar to the law enforcement solution, then, combined with "compassion fatigue"<sup>250</sup> and taxpayer frustration, and an "increasingly hostile climate for homeless persons,"<sup>251</sup> will likely result in the continued reduction or elimination of the programs.

So, whether or not lawyers win lawsuits using the involuntariness approach, meaningful solutions to the problems of homeless individuals seem unlikely to result from those litigation efforts.

To address the situation effectively, lawyers may need to look beyond traditional lawyers' approaches, and to strive, in dialogue and in concert with homeless people, for real solutions to their real problems.<sup>252</sup>

What are the alternatives? Some suggestions follow. They require a more realistic appraisal of the causes of homelessness, and of the nature of homeless people's life choices.

Lawyers who conclude that the helplessness strategy is the wrong direction may want to consider a variety of alternatives.<sup>253</sup>

One is to devise ways of reframing litigation arguments to try to influence legal doctrine to acknowledge the autonomy that homeless individuals exercise in a world of frighteningly limited and inadequate choices. Can the law accommodate both a recog-

250. See, e.g., Isabel Wilkerson, *Shift in Feelings on the Homeless: Empathy Turns to Frustration*, N.Y. TIMES, Sept. 2, 1991, at A1; Jill Smolowe, *Giving the Cold Shoulder*, TIME, Dec. 6, 1993, at 28. See also Sossin, *supra* note 37, at 625 (noting that "sporadic judicial concern has been overshadowed by the larger trend of the public's 'compassion fatigue' with homelessness . . . [which] mirrors a collective impatience with the state's inability (or unwillingness) to reduce poverty through government intervention in the form of conventional welfare programs.").

251. Takahashi, *supra* note 36, at 291.

252. See, e.g., White, *The Real Deal*, *supra* note 9, at 312-13.

253. Lucie White has identified "three dimensions on which lawyering might be a catalyst for social change." Lucie E. White, *Collaborative Lawyering in the Field? On Mapping the Paths from Rhetoric to Practice*, 1 CLINICAL L. REV. 157, 157 (1994). The first is "advocacy which seeks to make the positive law more responsive to the social welfare needs of socially disempowered groups" and involves litigation, lobbying and monitoring administrative agencies. *Id.* The second is "advocacy which seeks to transform values in dominant cultures so as to encourage greater sensitivity to the injustices poor people face, greater respect for their life projects, and a clearer will to mobilize public resources on their behalf" through the transformation of trials and legislative sessions into "educational or theatrical event[s] that [are] designed to move [their] audiences to empathize with poor people and form political coalitions with them." *Id.* The third dimension is "advocacy that is focused on poor people's own political consciousness" and that "seeks to enable poor people to see themselves and their social situation in ways that enhance their world-changing powers" while "seek[ing] to change the attitudes and self-concepts of lawyers themselves." *Id.*



dition of the agency (though limited) that homeless people exercise, as well as judicial "distrust"<sup>254</sup> of a political process that has undemocratically produced the inequality and inhumanity reflected in mass poverty and homelessness?<sup>255</sup> Can lawyers craft legal arguments to achieve this result? This would require a radical reconceptualization of both the nature of homelessness and the legal obligations of government under existing law.

Another alternative is to participate in attempts to change prevailing social conditions through concerted, grass-roots<sup>256</sup> political action, to strive to change the hearts and minds of average citizens, political policy-makers, and resource-allocators.<sup>257</sup> Given the current conservative, anti-poor mood of local and national legislatures,<sup>258</sup> the time may not seem propitious for this kind of political action. Yet, precisely because of that backlash, it may be even more urgent that those efforts be undertaken. Since public opinion seems somewhat less hostile than the actions of public officials,<sup>259</sup> the time may be right to mount a counter-offensive.

The alternative approaches are far from mutually exclu-

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254. See generally JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980).

255. See Loffredo, *supra* note 203, at 1281, 1285 ("The polarity between democratic ideal and economic elitism has intensified in the second half of the twentieth century as . . . a radical maldistribution of wealth has profoundly influenced political affairs . . . [T]he political process provides little security for even the most basic interests of the poor . . .").

256. See VANDERSTAAY, *supra* note 1, at 187 (advocating "cooperative, grass-root, self-help programs that place responsibility upon homeless people while entrusting them with the tools, services, and resources they need to better themselves").

257. See Schnably, *supra* note 68, at 557-58 (noting that the "invisibility" and "disciplinary" strategies adopted by local governments in response to homelessness both share a "singular inattention to promoting democratic empowerment of the people they purport to help").

258. See, e.g., Rebecca Anne Allahyari, *The Micro-Politics of Worthy Homelessness: Interactive Moments in Congressional Hearings*, 67 SOC. INQUIRY 27 (1997) (finding, in analyzing four Congressional hearings on homelessness held 1987-1990, examples of members of Congress identifying as causes of homeless witnesses' homelessness "a dysfunctional psychological response to shared housing" *id.* at 32; an "incapacity [of homeless veterans] to adequately establish social ties" *id.* at 36; and the inability of a homeless woman with a young child to locate and seek assistance from an abusive estranged husband. *Id.* at 40-41.).

259. See, e.g., Blasi, *And We Are Not Seen*, *supra* note 9, at 563 (noting that although there has been a "shift in elite attitudes toward homelessness . . . opinion polling data suggest that there remains in the wider public consciousness a substantial and growing reservoir, still largely untapped, of compassion and concern about poverty and homelessness."). Toro & McDonell, *supra* note 185, at 69 (concluding that results of the authors' and others' public opinion surveys demonstrated that there was "extensive public support for homeless people").

sive.<sup>260</sup> Litigation can serve a public consciousness-raising function,<sup>261</sup> and for public interest lawyers it is "often merely a part of a multi-pronged strategy, which might also include administrative and legislative advocacy."<sup>262</sup>

Lawyers may want to join or form coalitions with community activists. Together they might seek broad social change through structural reform in such areas as employment, housing and medical care, with a focus on the intersection of poverty, race and gender.

Some attorneys might sign on with progressive organizations that target specific aspects of poverty and homelessness through broad strategic initiatives. One such organization is Housing Works, a New York City-based "community . . . where homeless and formerly homeless men and women, professionals and volunteers work side by side to improve conditions for . . . [o]ver 30,000 New Yorkers with AIDS and HIV currently liv[ing] in shelters, on the streets or in severely inadequate housing."<sup>263</sup>

The group attacks the problem on a number of fronts, providing housing programs, supportive services (such as peer support, life skills training, nutritional counseling and parenting education), job training and literacy classes, alternatives to traditional drug treatment programs, and a tuberculosis prevention and control program. Prominent among its goals is to "as-

260. As the lawyer who brought the landmark *Callahan* case has suggested, "litigation is just a process toward winning the hearts and minds of a majority of the voters." Hayes, *supra* note 248, at 10. "[O]n the most fundamental level, courts depend on political support to produce [significant social] reform." Rosenberg, *supra* note 247, at 336. "Lawyers representing homeless people have an obligation to press for broad reform in order to further our clients' fundamental goal" of escaping homelessness. Foscarinis, *Beyond Homelessness*, *supra* note 235, at 67.

261. "Lawyers . . . file cases in court to encourage debate on important social issues as much as they do to achieve results for their particular clients." Abbott, *supra* note 206, at 305 (citing, as an example of a source supporting this assertion, Martha Minow, *Law and Social Change*, 62 UMKC L. REV. 171, 173 (1993)). See also Barbara Sard, *The Role of the Courts in Welfare Reform*, LITIGATION, at 115 (PLI Litig. & Admin. Practice Course Handbook Series No. 428, 1992) ("It is clear that where increased welfare benefits are concerned, an 'elite' legal strategy can only be an accompaniment to, and not a substitute for, a broad-based movement.").

262. Abbott, *supra* note 206, at 306 (citing Harold A. McDougall, *Lawyering and Public Policy*, 38 J. LEG. EDUC. 369, 382-83 (1988)). Some lawyers and law students have joined the attack on homelessness in another traditional role, outside the litigation context: transactional lawyering. See, e.g., Rebecca Arbogast et al., *Revitalizing Public Interest Lawyering in the 1990s: The Story of One Effort to Address the Problem of Homelessness*, 34 HOW. L.J. 91 (1991) (describing clinical program at Yale Law School that helped community organizations build affordable housing in New Haven).

263. *What is Housing Works?*, Oct. 23, 1997, <<http://www.housingworks.org/about.htm>> (on file with author and the *Buffalo Law Review*).

sist[] clients to advocate for themselves with landlords and public agencies."<sup>264</sup>

Housing Works "provides legal services for individual clients and also advocates the systemic changes necessary to ensure that all persons with HIV/AIDS have access to housing and services."<sup>265</sup> One of its goals is "to have clients direct advocacy efforts and to coordinate individual and impact advocacy as systemic problems are identified from the barriers faced by individual clients."<sup>266</sup>

What is essential is the involvement of homeless people themselves.<sup>267</sup> They are "not . . . inert or completely beaten down."<sup>268</sup> "[T]he most salient characteristic of the solutions homeless people seek for themselves [is] the desire to help each other. . . . [T]his sense of alliances is much more than a vague wish for togetherness or cooperation: it is a strategic response to perilous conditions."<sup>269</sup>

Only homeless people can truly comprehend the realities of homelessness. Positive change in their life conditions is unlikely to result from discussions and decisions in which they do not take the lead, or even participate.<sup>270</sup>

264. *Id.*

265. Shubert & Hombs, *supra* note 206, at 748.

266. *Id.*

267. See Schnably, *supra* note 68, at 559 (advocating "the development of a political identity through collective self-assertion and mobilization of homeless people themselves."). See also Abbott, *supra* note 206, at 287-88 (urging that "critical lawyers should engage clients in a collaborative process intended to achieve broader goals than a court victory."). Abbott, however, doubts that homeless people are capable of participating effectively in this process. *Id.* at 289.

Buchanan and Trubek urge public interest lawyers to adopt a number of tenets of the "critical lawyering vision," including:

encourag[ing] participation of clients . . . in practice decisions; . . . seek[ing] to access client experiences regarding strategies for struggle and resistance; develop[ing] a healthy skepticism regarding traditional advocacy arenas; continually re-evaluat[ing] advocacy effectiveness from a client perspective[;] encourag[ing] organization and collective efforts by clients; [and] working with existing social movements and client groups.

Ruth Buchanan & Louise G. Trubek, *Resistances and Possibilities: A Critical and Practical Look at Public Interest Lawyering*, 19 N.Y.U. REV. L. & SOC. CHANGE 687, 691 (1992).

268. Schnably, *supra* note 68, at 569.

269. VANDERSTAAY, *supra* note 1, at 185.

270. See Thompson, *supra* note 236, at 658-59 (attributing the "failure" of "liberal homeless policy" in New York City in part to homeless advocates having pursued "an elite court and media-centered strategy that politically isolated the homeless.").

Commentators have critiqued the tendency of lawyers for poor and subordinated people to believe they best know how to interpret and pursue their clients' interests. See Alfieri, *supra* note 7, *Speaking Out of Turn: The Story of Josephine V.*, 4 GEO. J. LEGAL ETHICS 619 (1991); White, *Subordination*, *supra* note 7.

Many advocates work tirelessly to bring relief to the lives of those who suffer greatly. They often feel deep frustration when their efforts do not achieve the results they seek. The cause is noble, the effort sincere. This Article is an attempt to suggest some different directions, in the hope that suffering and frustration might thereby be reduced.

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Gerald Lopez has applied the term "regnant" to a style of lawyering in which lawyers act as "self-styled 'political heroes' [and] 'preeminent problem-solvers,' rushing to cure situations of injustice, even though they know little about the cultural, political, and socioeconomic structures of subordination and 'try little to learn whether and how formal changes in law penetrate the lives of subordinated people.'" Anthony V. Alfieri, *Practicing Community*, 107 HARV. L. REV. 1747, 1753-54 (1994) (reviewing GERALD P. LOPEZ, *REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE* (1992)). Regnant lawyering "rationalizes client helplessness" and "relegate[s] clients to roles of passivity and obedience." *Id.* at 1754. Alfieri believes that "[f]or advocates in civil rights and poverty law contexts, the received tradition of practice constructs clients as victims. This construction reduces clients to powerless and pathological objects." *Id.* at 1761. He illustrates and analyzes lawyers' use of the "victimization strategy" in the disability context in Anthony Alfieri, *Disabled Clients, Disabling Lawyers*, 43 HASTINGS L.J. 769, 811-28 (1992). He suggests, in its place, an "enabling strategy," based on alternative "structure-transforming" and "context-transforming" practices. *Id.* at 828-48. For a recent example of legal scholarship that reflects the regnant lawyering approach in the homelessness context, see Abbott, *supra* note 206, at 301 (stating that "[a] homeless person may require an advocate's assistance at the preliminary stage of identifying the nature of his or her difficulties and recognizing that the legal system may be of help in solving those problems."). Abbott also believes that many homeless people

often experience a sense of alienation from society as a whole[;] take their situation for granted[;] are resigned to their status[;] find it difficult to attribute specific blame for their homelessness[; and even when they are] able to attribute blame [are] likely to find the process of confronting the allegedly responsible party and making a claim for redress an insurmountable burden. . . . Thus, the particular characteristics of homelessness present significant problems in applying critical lawyering theories which encourage lawyers to go beyond rights-based theories and to assist the client in becoming a fully-empowered partner in remedying the problem.

*Id.* at 302-304. Abbott nevertheless also endorses "allowing clients to tell their own stories." *Id.* at 312.

